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ALTERNATIVE DISPUTE RESOLUTION

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 2274

A BILL TO AUTHORIZE AND ENCOURAGE FEDERAL AGENCIES TO USE MEDIATION, CONCILIATION, ARBITRATION, AND OTHER TECHNIQUES FOR THE PROMPT AND INFORMAL RESOLUTION OF DISPUTES, AND FOR OTHER PURPOSES

MAY 25, 1988

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ALTERNATIVE DISPUTE RESOLUTION

WEDNESDAY, MAY 25, 1988

U.S. Senate,
Subcommittee on Courts and Administrative Practice,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senators Grassley and Thurmond.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator Heflin. Today we will hear testimony on legislation introduced by the ranking member of this subcommittee, Senator Grassley, which would provide for alternative mechanisms for dispute resolution in Federal agencies. I should note that this bill was referred to the Committee on Governmental Affairs, but is of interest to this subcommittee because of our interest in administrative adjudication.

Second, we will hear from witnesses on legislation concerning the Rules Enabling Act, specifically, concerns raised with the elimination of the supersession clause.

Finally, we will turn our attention to a bill dealing with the choice of law to be applied when foreign citizens, when injured by American products, bring suit in the United States.

I would note at the outset that we are attempting to understand the impact of this legislation both from a business perspective and from a consumer perspective. We want the record to be complete.

I look forward to the testimony of the witnesses appearing today. We appreciate your taking the time from your schedules to be a part of this hearing process.

I must ask, since we have three bills here this morning, that each witness limit his or her statement to 5 minutes. Your written statements will be submitted for the record in their entirety. So if you would kindly summarize and limit it to 5 minutes.

Before we begin with our first panel, we have prepared statements of Senators Thurmond and Grassley and the text of S. 2274 to place in the record at this time.

[Submissions for the record follow:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE. REFERENCE, HEARING ON S.2274, A BILL TO AUTHORIZE AND ENCOURAGE FEDERAL AGENCIES USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES. ROOM SD-226, WEDNESDAY, MAY 25, 10:00 A.M.

MR. CHAIRMAN:

Today we are here to consider testimony regarding S.2274, a bill to authorize and encourage Federal agencies to use mediation, conciliation, arbitration and other means of alternative dispute resolution (ADR) for the prompt and informal resolution of disputes.

Recently, there has been an increase in agency litigation, coupled with complex rules, regulations, and procedures which must be followed. The diversion of agency time and energy due to increased litigation is a loss which cannot be easily measured. Statistics show that federal agencies are involved in hundreds of thousands of disputes annually. The administrative office of the U.S. courts estimates that for the year ending June 30, 1987, 30 percent of all civil cases commenced involved the United States as a party. That figure amounts to over 72,000 actions which must be resolved.

Alternative dispute resolution has been used in the private sector for many years and should be carefully considered as a workable option. As well, in 1987 there were 275 ADR programs of various types in existence in over 40 states.

In summary, no one can dispute that this proposal has the potential to reduce the cost of law suits against government agencies. The reduction of costs is in the interest of both the government and the taxpayers of this Nation. Although some of the provisions of this legislation must be studied to be sure they are workable, the concept embodied by this bill could reduce the burdens on courts, agencies, and the economy.

I look forward to the testimony of those in attendance here today.

STATEMENT OF SENATOR CHARLES E. GRASSLEY
HEARING OF S.2274
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
MAY 25, 1988

MR. CHAIRMAN, I COMMEND YOU FOR HOLDING THIS HEARING ON THE ALTERNATIVE DISPUTE RESOLUTION ACT, MY BILL TO FACILITATE AND ENCOURAGE THE USE OF LESS FORMAL METHODS OF DISPUTE RESOLUTION AS AN ALTERNATIVE TO ADMINISTRATIVE LITIGATION.

THOUSANDS OF ADMINISTRATIVE DECISIONS ARE NOW HANDLED THROUGH HIGHLY ADVERSARIAL PROCEDURES THAT ARE COMPLEX, COSTLY, AND LENGTHY. ADMINISTRATIVE PROCEDURES SHOULD FOSTER PROMPT AND EFFICIENT RESOLUTION OF DISPUTES, BUT CURRENT PRACTICE IS LARGELY A FAILURE IN THIS REGARD.

IN THE PRIVATE SECTOR, ALTERNATIVE MEANS OF DISPUTE RESOLUTION (A.D.R.) -- SUCH AS NEGOTIATION, MEDIATION, MINITRIALS, AND ARBITRATION -- HAVE BEEN USED TO GREAT ADVANTAGE TO PRODUCE QUICKER, BETTER, LESS EXPENSIVE DECISIONS.

A.D.R. HAS ALSO DEVELOPED INTO A VIABLE OPTION AT THE STATE AND LOCAL GOVERNMENT LEVELS. OVER 20 STATE LEGISLATURES HAVE ENACTED LAWS ESTABLISHING STATEWIDE MEDIATION CENTERS OR OTHER DISPUTE RESOLUTION PROCEDURES. A 1987 SURVEY OF STATE COURT ADMINISTRATORS IDENTIFIED 275 OPERATING COURT-RELATED A.D.R. PROGRAMS OF VARIOUS TYPES IN OVER 40 STATES, INCLUDING DISPUTES TO WHICH STATE GOVERNMENTS ARE PARTIES. THE FEDERAL GOVERNMENT HAS MUCH TO LEARN FROM THESE EXPERIENCES. A.D.R.'S SUCCESS IN THE SETTLEMENT OF VARIOUS DISPUTES AROUND THE COUNTRY POINTS TO ITS POTENTIAL FOR USE IN THE FEDERAL SECTOR, AND DEMONSTRATES THAT IT IS NOT A NEW HIGH-RISK TECHNIQUE BUT RATHER A VIABLE OPTION.

OUR PRESENT COMPLEX SYSTEM OF ADMINISTRATIVE LAW FEATURES A VARIETY OF AGENCY BOARDS AND OFFICES, ESTABLISHED TO HANDLE A DIVERSITY OF CASES INVOLVING ISSUES IN GRANT, BENEFIT, PROCUREMENT, REGULATORY, AND OTHER KINDS OF PROGRAMS. FEDERAL AGENCIES ARE INVOLVED IN FAR MORE DISPUTES THAN EVER AS PARTIES (EVEN ON A PER CAPITA BASIS). THEY ALSO DECIDE FAR MORE CASES THAN DO THE FEDERAL COURTS (HUNDREDS OF THOUSANDS ANNUALLY). AS THE NUMBER OF CASES HAS RISEN, THE JURISDICTION OF EXISTING OFFICES OF ADMINISTRATIVE LAW JUDGES AND OTHER BOARDS HAVE BEEN EXPANDED. WHOLE NEW SECTIONS OF THE BAR HAVE SPRUNG UP TO SERVE PARTIES TO DISPUTES AND TO CARRY ON LITIGATION. EXISTING ADMINISTRATIVE AGENCY PROCEDURES OFTEN SERVE TO INCREASE THE CONTENTIOUSNESS OF PARTIES, RATHER THAN FACILITATE SOLUTIONS.

THE TIME HAS COME TO RECOGNIZE THAT FORMAL PROCEDURES ARE OFTEN AN INEFFICIENT MEANS OF RESOLVING THE DIFFICULT ISSUES THAT INEVITABLY ARISE IN FEDERAL AGENCY DECISIONMAKING, AND MAY EVEN DIVERT ATTENTION AWAY FROM CRITICAL SUBSTANTIVE PROBLEMS. MY ENTHUSIASM FOR THE POTENTIAL OF A.D.R. STEMS FROM THE HOPE THAT IT WILL REDUCE THIS BURDEN ON COURTS, AGENCIES, AND THE ECONOMY, AS WELL AS PROVIDE MORE SATISFYING MEANS OF JUSTICE FOR A LARGER PORTION OF THE POPULATION. IN AN ERA OF DEFICIT REDUCTION, THE POTENTIAL OF A.D.R. TO REDUCE THE COSTS OF GOVERNMENT DECISIONMAKING MUST NOT BE OVERLOOKED.

THUS, A.D.R. IS NOT ONLY IN THE INTEREST OF THE GOVERNMENT. IT IS ALSO IN THE PUBLIC'S INTEREST.

CONGRESS HAS OCCASIONALLY RECOGNIZED THE VALUE OF A.D.R. METHODS. FOR EXAMPLE, IN ENACTING THE ARBITRATION ACT, THE

LEGISLATIVE BRANCH LEGITIMIZED A USEFUL METHOD FOR HEARING AND DECIDING COMMERCIAL, LABOR, INTERNATIONAL, AND A VARIETY OF OTHER CASES -- A METHOD THAT MOST AMERICAN COURTS HAD TRADITIONALLY DISFAVORED. THIS ACT HELPED MAKE POSSIBLE THE DEVELOPMENT OF PRIVATE SECTOR DISPUTE RESOLUTION.

SUBSEQUENTLY, CONGRESS CREATED THREE FEDERAL AGENCIES WHOSE PRIMARY GOALS WERE TO RESOLVE CONFLICTS IN KEY SOCIAL AND ECONOMIC AREAS -- THE FEDERAL MEDIATION AND CONCILIATION SERVICE COVERING PRIVATE LABOR AND AGE DISCRIMINATION DISPUTES; THE COMMUNITY RELATIONS SERVICE OF THE DEPARTMENT OF JUSTICE IN CIVIL RIGHTS AND SOCIAL JUSTICE CASES; AND THE NATIONAL MEDIATION BOARD IN AIRLINE AND RAILWAY DISPUTES. THESE AGENCIES HAVE ACHIEVED IMPRESSIVE RESULTS SINCE THEIR INCEPTION.

NOTWITHSTANDING THESE POSITIVE RESULTS, CONGRESS HAS DONE LITTLE TO ENCOURAGE A.D.R.

ON THEIR OWN, WITH LITTLE OR NO CONGRESSIONAL ENCOURAGEMENT, A FEW AGENCIES HAVE BEGUN TO MAKE USE OF A.D.R. THE ARMY CORPS OF ENGINEERS AND THE DEPARTMENT OF THE NAVY HAVE RECENTLY ADOPTED CONTRACT POLICIES THAT FURTHER THE USE OF MINITRIALS, MEDIATION, SUMMARY PROCEEDINGS, AND RELATED FORMS OF A.D.R. IT IS NOT UNUSUAL FOR CONTRACT DISPUTES TO TAKE THREE TO FOUR YEARS FROM FILING TO DECISION. A.D.R. EFFORTS RESPOND TO DISSATISFACTION WITH THE PRESENT SYSTEM AMONG CONTRACTORS AND GOVERNMENT OFFICIALS. IN LIKE FASHION, NEGOTIATED RULEMAKING HAS EMERGED AT SEVERAL AGENCIES IN THE 1980'S AS AN ALTERNATIVE TO TRADITIONAL PROCEDURES FOR DRAFTING PROPOSED REGULATIONS. I AM A COSPONSOR OF SEN. LEVIN'S BILL (S.1504) TO PROMOTE "REG. NEG.," AND REDUCE THE PATTERN OF CONFRONTATION AND CHALLENGE IN RULEMAKING.

THE FEDERAL GOVERNMENT IS IN AN IDEAL POSITION TO SERVE AS A BEACON FOR THE REST OF OUR SOCIETY. ITS AGENCIES SHOULD BE IN THE FOREFRONT USING CONSENSUAL DISPUTE RESOLUTION. GOVERNMENT ATTORNEYS, PROGRAM OFFICIALS AND PRESIDING OFFICERS MUST COME TO VIEW ALTERNATIVE MEANS OF DISPUTE RESOLUTION AS A MAJOR SET OF TOOLS TO HELP THEM DO THEIR JOBS BETTER.

S.2274, THE ADMINISTRATIVE DISPUTE RESOLUTION ACT, WOULD ENCOURAGE AND EXTEND THE USE OF A.D.R. BY AGENCIES AND MAKE LIFE EASIER FOR THOSE WHO WILL TAKE ADVANTAGE OF ITS OPPORTUNITIES.

S.2274 WILL SEND A CLEAR SIGNAL TO AGENCIES, REVIEWING COURTS AND REGULATED PERSONS THAT INFORMED, THOUGHTFUL EFFORTS TO USE A.D.R. WILL BE SUPPORTED. BY AUTHORIZING PARTIES TO FIT THE PROCESS TO THE CASE-AT-HAND, S.2274 AFFORDS PARTIES THE FLEXIBILITY TO USE A.D.R. IN THOSE CASES IN WHICH ROUTINE PROCESSES WOULD INHIBIT DISPATCH OR CONSENSUAL RESOLUTION.

THE BILL REPEALS G.A.O.'S OVERLY RESTRICTIVE PROHIBITION ON ARBITRATION FOR THE MANY CASES IN WHICH ARBITRATION CAN BE USED CONSISTENT WITH THE PUBLIC INTEREST. SPECIFIC STATUTORY PROVISIONS THAT INHIBIT EFFECTIVE NEGOTIATION, SUCH AS PORTIONS OF THE FEDERAL TORT CLAIMS ACT AND CONTRACT DISPUTES ACT, ARE AMENDED. EFFORTS TO TRAIN GOVERNMENT PERSONNEL TO BE BETTER NEGOTIATORS AND JUDICIAL OFFICERS TO TAKE GREATER ADVANTAGE OF MEDIATION AND OTHER A.D.R. PROCESSES ARE VITAL, AND ARE ENCOURAGED AND FACILITATED BY THE BILL.

THE BILL ALSO HELPS THE GOVERNMENT USE ITS CURRENT RESOURCES TO ACHIEVE BETTER DECISIONS WITH A.D.R. IT EXPANDS THE AUTHORITY OF THE FEDERAL MEDIATION AND CONCILIATION SERVICE

TO INCLUDE MEDIATION OF DISPUTES RELATING TO ADMINISTRATIVE PROGRAMS. S.2274 ALSO CREATES NEW ROLES FOR THE ADMINISTRATIVE CONFERENCE IN SUPPORTING, ASSISTING, AND MONITORING AGENCIES' A.D.R. USE. THE BILL PROVIDES "SEED MONEY" TO MEET START-UP EXPENSES, SUCH AS TRAINING, RESEARCH, AND PUBLICATIONS, NECESSARY TO MAKE A.D.R. PART OF AGENCIES' INSTITUTIONAL FABRIC.

S.2274 RECOGNIZES THAT A.D.R. IS NOT APPROPRIATE FOR ALL CASES INVOLVING THE GOVERNMENT JUST AS WITH PRIVATE DISPUTES. IT ALSO DEALS WITH THE FACT THAT AGENCY USE OF SOME KINDS OF A.D.R. -- MAINLY ARBITRATION -- MAY RAISE POLICY, PRACTICAL, AND EVEN LEGAL CONCERNS THAT ARE NOT PRESENT IN MOST PRIVATE SECTOR DISPUTES.

SECTION 3 OF THE ACT CALLS ON AGENCIES TO CONSIDER POTENTIAL A.D.R. USES AND DEVELOP A DISPUTE RESOLUTION POLICY, TO APPOINT A DISPUTE RESOLUTION SPECIALIST, AND TO ENSURE PERSONNEL TRAINING IN NEGOTIATION AND DISPUTE RESOLUTION METHODS. THESE PROVISIONS ARE INTENDED TO PROMOTE BOTH THE ACT'S POLICY FAVORING A.D.R. AND ITS FINDINGS THAT GREATER USE OF A.D.R. WILL IMPROVE THE OPERATION OF THE GOVERNMENT.

SECTION 4 OF THE ACT AMENDS THE ADMINISTRATIVE PROCEDURE ACT TO SPECIFICALLY AUTHORIZE PARTIES TO AGREE TO USE MEDIATION, SIMPLIFIED OR EXPEDITED PROCEDURE, OR OTHER MUTUALLY AGREEABLE PROCESSES TO RESOLVE DISPUTES ARISING UNDER FEDERAL ADMINISTRATIVE PROGRAMS. ARBITRATION IS INCLUDED SUBJECT TO GENERAL GUIDELINES ON ISSUES LIKELY TO BE APT OR INAPT FOR A.D.R. THE ACT ALSO INCLUDES NECESSARY GUARANTEES OF CONFIDENTIALITY IN AGENCY A.D.R., AND PROVIDES JUDICIAL REVIEW PROCESSES THAT BALANCE THE NEEDS FOR EXPEDITION, FINALITY, AND ACCOUNTABILITY.

SECTION 5 OF THE ACT AMENDS THE CONTRACT DISPUTES ACT TO ENCOURAGE AGENCY CONTRACTING OFFICES AND B.C.A.'S TO USE CONSENSUAL METHODS TO SETTLE ACQUISITION DISPUTES; IT SPECIFICALLY AUTHORIZES USE OF A.D.R. IN CONTRACT DISPUTES, SUBJECT TO SECTION 4'S GUIDELINES. THESE CHANGES WILL GREATLY ENHANCE THE FLEXIBILITY OF CONTRACTING OFFICERS, BOARDS OF CONTRACT APPEALS, AND CONTRACTORS TO USE MINITRIALS AND OTHER APPROPRIATE MEANS TO HANDLE CONTRACT CLAIMS BETTER.

SECTION 7 OF THE ACT AMENDS THE FEDERAL TORT CLAIMS ACT TO RAISE AGENCY SETTLEMENT DISCRETION FROM THE PRESENT $25,000 TO A NEW LIMIT OF $100,000. THE CURRENT LEVEL, SET OVER 40 YEARS AGO, REQUIRES DEPARTMENT OF JUSTICE APPROVAL OF MANY PROPOSED SETTLEMENT AGREEMENTS IN SMALL CASES THAT RAISE NO SIGNIFICANT ISSUES. IT ALSO SERVES TO CHILL SETTLEMENT DISCUSSIONS, SINCE AGENCIES OFTEN CANNOT NEGOTIATE EFFECTIVELY.

THE ACT ALSO TAKES STEPS TO MAKE IT EASIER FOR AGENCIES TO USE A.D.R. IT AUTHORIZES THEM, FOR INSTANCE, TO ACCEPT VOLUNTEER SERVICES FROM MEDIATORS OR OTHER A.D.R. "NEUTRALS" AND TO HIRE THEM PROMPTLY AND EFFICIENTLY. THE ACT ALLOWS AGENCIES DISCRETION TO REIMBURSE CERTAIN EXPENSES OF IMPECUNIOUS NECESSARY PARTIES -- THOSE WITHOUT WHOM THE NEGOTIATIONS WOULD NOT BE POSSIBLE -- FOR PARTICIPATING IN A.D.R. PROCEEDINGS. UNLIKE PAST "INTERVENOR" FUNDING, THIS REIMBURSEMENT AUTHORITY WOULD BE LIMITED TO ENSURING EFFECTIVE NEGOTIATION BY ABSOLUTELY CRUCIAL INTERESTS THAT WOULD OTHERWISE BE UNREPRESENTED. THE ACT ALSO ENCOURAGES AGENCIES TO CONSIDER THE POTENTIAL USES FOR NON-LAWYER REPRESENTATIVES IN CERTAIN KINDS OF "MASS JUSTICE" SITUATIONS, SUBJECT TO PROCESSES FOR OVERSEEING THE EFFECTIVENESS OF SUCH REPRESENTATION.

THE ACT ENLARGES THE AUTHORITY OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES AND THE FEDERAL MEDIATION CONCILIATION SERVICE TO AID AGENCIES' USE OF A.D.R. THE AUTHORITY OF F.M.C.S. WOULD BE INCREASED TO INCLUDE MEDIATION, TRAINING AND OTHER ASSISTANCE IN ADMINISTRATIVE DISPUTES. THE ADMINISTRATIVE CONFERENCE WOULD REPORT TO CONGRESS PERIODICALLY ON AGENCIES' IMPLEMENTATION OF THE ACT, ESTABLISH A ROSTER OF QUALIFIED NEUTRALS FOR OPTIONAL USE BY PARTIES TO ADMINISTRATIVE DISPUTES, OFFER TRAINING AND OTHER SUPPORT TO AGENCIES IN COOPERATION WITH F.M.C.S. AND PROFESSIONAL ORGANIZATIONS, AND REIMBURSE CERTAIN AGENCY EXPENSES CONNECTED WITH A.D.R. USE AND TRAINING.

THESE INITIATIVES MUST BE COMPLEMENTED BY INFORMED, PERIODIC CONGRESSIONAL OVERSIGHT, AND BY CREATION OF INCENTIVES FOR HIGH LEVEL EXECUTIVE BRANCH OFFICIALS AND OTHER AGENCY PERSONNEL TO USE A.D.R. IN THE LONG RUN, WHATEVER SLIGHT COSTS MAY BE INVOLVED WILL BE FAR OUTWEIGHED BY THE IMPROVEMENTS IN DECISIONMAKING AND THE GREATER SATISFACTION OF PARTICIPANTS. CONCEIVABLY, THESE EFFORTS MIGHT MARK THE BEGINNING OF A NEW TREND, AWAY FROM FORMALIZED PROCEDURES TOWARD A NEW FLEXIBILITY THAT REALISTICALLY RECOGNIZES LIMITS ON OUR RESOURCES.

IN SUM, THE USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION WILL BRING A VARIETY OF QUANTITATIVE AND QUALITATIVE BENEFITS. SUCCESSFUL USE BY COURTS AND AT STATE AND LOCAL LEVELS (AND EVEN IN THE FEW EXPERIENCES AT THE FEDERAL LEVEL) PROVIDE AGENCIES WITH OPPORTUNITIES TO LEARN, TO EMULATE, AND TO INNOVATE. ADMINISTRATIVE JUSTICE NEED NOT BE SO EXPENSIVE OR TIME-CONSUMING. THE CONGRESS AND THE EXECUTIVE BRANCH SHOULD ACCEPT THE CHALLENGE OF WORKING TOGETHER FOR MORE SATISFACTORY, EFFECTIVE ADMINISTRATIVE PROCEDURES. THE SUCCESSES OF A.D.R. METHODS IN OTHER ARENAS MAKE LIKELY SIMILAR SUCCESSES FOR THE FEDERAL BUREAUCRACY.

II

100TH CONGRESS
2D SESSION

S. 2274

To authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 12 (legislative day, APRIL 11), 1988

Mr. GRASSLEY (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

---

A BILL

To authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Dispute Resolution Act of 1988".

SEC. 2. FINDINGS.

The Congress finds that—

(1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer prompt, expert, and inexpensive

means of resolving disputes as an alternative to litigation in the Federal courts;

(2) administrative proceedings have become marked increasingly by formality, costs and delays and often result in unnecessary expenditures of the time of individuals and the resources of society and decreased likelihood of achieving consensual resolution of disputes;

(3) alternative means of dispute resolution (including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration) have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;

(4) such alternative means also lead to more creative, efficient, and sensible outcomes that foster stability because of the acceptability of such means to the parties involved and to the public in general;

(5) such alternative means may be used advantageously in widely varied administrative programs;

(6) explicit authorization for use of well-tested dispute resolution techniques will eliminate ambiguity of agency power under applicable law and will encourage use of common sense procedures in appropriate cases;

(7) every agency should undertake a careful review of programs and the disputes involved to ensure increased application of appropriate alternative means;

(8) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and

(9) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

SEC. 3. PROMOTION OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

(a) Promulgation of Agency Policy.—Each agency is encouraged to promulgate policies that address the use of the full range of alternative means of dispute resolution and case management in each administrative program of such agency. In developing policy, each agency is encouraged to—

(1) consult with the Administrative Conference of the United States, the Federal Mediation and Conciliation Service, and professional associations; and

(2) examine procedures for resolving every kind of dispute including controversies that arise as a part of—

(A) formal or informal adjudication;

(B) rulemaking;

(C) enforcement;

(D) issuing or revoking permits;

(E) settling disputes; and

(F) litigation brought by or against the agency.

(b) DISPUTE RESOLUTION SPECIALISTS.—Each agency shall designate a senior official to be the dispute resolution specialist of the agency. Such official shall implement—

(1) the provisions of this Act with regard to such agency; and

(2) the agency policy promulgated pursuant to subsection (a).

(c) TRAINING.—Each agency shall provide for training to be made available regularly to the dispute resolution specialist of the agency and other employees involved in implementing the policy of the agency under this Act. Such training may encompass theory and practice of negotiation, mediation, arbitration, or related techniques. The dispute resolution specialist shall periodically recommend to the agency head a list of agency employees for similar training.

(d) PROCEDURES FOR GRANTS AND CONTRACTS.—

(1) Each agency shall review each standard contract, grant, and other assistance agreements and shall amend them to authorize and encourage use of alternative means of dispute resolution at all stages where disputes may arise. The Office of Federal Procurement Policy of the Office of Management and Budget shall consult with agencies and other persons to develop guidance and standard clauses for contracts.

(2) Within 1 year after the date of enactment of this Act, the Civilian Agency Acquisition Council and the Defense Acquisition Council, in consultation with the Administrative Conference of the United States, shall adopt any amendments to the Federal Acquisition Regulation, or propose any statutory changes, necessary to adapt acquisition procedures to the requirements of the dispute resolution process.

SEC. 4. ADMINISTRATIVE PROCEDURES.

(a) ADMINISTRATIVE HEARINGS.—Section 556(c) of title 5, United States Code, is amended—

(1) in paragraph (6) by inserting before the semicolon at the end thereof: "or by the use of alternative means of dispute resolution as provided by subchapter IV of this chapter"; and

(2) by redesignating paragraphs (7) through (9) as paragraphs (9) through (11), respectively and inserting after paragraph (6) the following new paragraphs:

"(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

"(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;".

(b) ALTERNATIVE MEANS OF DISPUTE RESOLUTION.—Chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER IV—ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

"§ 581. Definitions

"For the purposes of this subchapter—

"(1) 'agency' has the same meaning as in section 551(1) of this title;

"(2) 'administrative program' means any program administered by an agency and includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing, or investigation, as such terms are used in section 551 of this title;

"(3) 'alternative means of dispute resolution' means any procedure that is voluntarily used to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof;

"(4) 'dispute resolution proceeding' means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and identified parties participate;

"(5) 'issue in controversy' means a question that is material to a decision concerning an administrative program about which persons who would be substantially affected by the decision or the agency disagree;

"(6) 'neutral' means an individual who, with respect to an issue in controversy, serves as a conciliator, facilitator, mediator, factfinder, or arbitrator, or otherwise functions specifically to aid the parties in resolving the controversy;

"(7) 'party' has the same meaning as in section 551(3) of this title;

"(8) 'person' has the same meaning as in section 551(2) of this title; and

"(9) 'roster' means a list of persons qualified to provide services as neutrals.

"§ 582. General authority

"(a) Each agency may use alternative means of dispute resolution for the resolution of any issue in controversy that relates to an administrative program, if the involved parties agree to such procedures.

"(b) In determining whether the use of an alternative means of dispute resolution is appropriate, an agency and the parties shall consider whether—

"(1) a definitive or authoritative resolution of the matter is required for precedential value, and, if so, whether such a proceeding is likely to be accepted generally as an authoritative precedent;

"(2) the matter involves significant questions of Government policy that require additional procedures before a final resolution may be made, and, if so, whether such a proceeding may serve to develop a recommended policy for the agency;

"(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased;

"(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

"(5) a full public record of the proceeding is important, and, if so, whether a dispute resolution proceeding can provide such a record; and

"(6) the agency shall maintain continuing jurisdiction over the matter with authority to alter the disposition in the light of changed circumstances.

"§ 583. Neutrals

"(a) A neutral may be a permanent or temporary government employee or a private individual who has demonstrated competence and is professionally qualified in the area of dispute resolution. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing and all parties agree that the neutral may serve. The services of a neutral may be obtained by the parties or by an agency.

"(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

"§ 584. Confidentiality

"(a) A neutral may not testify or furnish documents concerning any matter relating to a dispute resolution proceeding, nor shall a neutral be compelled to testify or furnish documents relating to such proceeding, unless—

"(1) all parties to the proceeding and the neutral consent in writing; or

"(2) the neutral is required by statute to report specific categories of information, in which case the neutral shall make a good faith effort to inform the parties to a dispute resolution proceeding as early as possible of any such requirements that may be relevant.

"(b) No testimony may be received in any proceeding concerning any oral communication made in confidence during a dispute resolution proceeding. No material that was prepared in connection with a dispute resolution proceeding that was furnished to other parties in confidence during the proceeding may be considered in any other proceeding, except—

"(1) such material may be offered into evidence by the party who prepared the material;

"(2) such material may be offered into evidence to prove bias or prejudice of a witness, to rebut testimony or evidence which is submitted by the party preparing the material, or to prove an effort to obstruct a criminal investigation or prosecution; and

"(3) that this section may not preclude the discovery or use of any document or communication that is otherwise discoverable or is obtained through independent investigation.

"(c) Subsections (a) and (b) shall not prevent the gathering of information for statistical or research purposes or educational efforts in cooperation with other agencies, governmental entities, or dispute resolution programs, if the parties or the specific issues in controversy are not identifiable.

"(d) Subsections (a) and (b) shall not apply in any action against a neutral for negligent or fraudulent acts or omissions affecting a dispute resolution proceeding, if such action does not also involve the resolution of any issue that was in controversy in the proceeding in which allegedly improper conduct of the neutral occurred.

"§ 585. Authorization of arbitration

"(a)(1) Arbitration as provided by this subchapter may be used whenever all parties consent, either before or after a dispute has arisen. An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining any benefit. A party may agree to—

"(A) submit only certain issues in controversy to arbitration; or

"(B) arbitration on the condition that the award must be within a range of possible outcomes.

"(2) Any arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing.

"(b) Any agency official may offer to use arbitration for the resolution of issues in controversy, if such official—

"(1) has authority to enter into settlement stipulations concerning a matter; or

"(2) is otherwise specifically authorized by the agency to consent to use of arbitration.

"§ 586. Enforcement of arbitration agreements

"An agreement to arbitrate is enforceable pursuant to section 4 of title 9, United States Code, and no action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

"§ 587. Arbitrators

"(a) The parties shall be entitled to participate in the selection of any arbitrator.

"(b) An arbitrator shall be a neutral who meets the criteria of section 583 of this title.

"§ 588. Authority of the arbitrator

"An arbitrator to whom a dispute is referred under this subchapter may—

"(1) regulate the course of and conduct arbitral hearings;

"(2) administer oaths and affirmations;

"(3) issue subpoenas for attendance of witnesses and production of evidence at the hearing, enforceable under the provisions of section 7 of title 9, United States Code, except that no subpoena shall be issued except for material that is relevant to the resolution of the issues and is necessary to achieve justice in the matter; and

"(4) make awards.

"§ 589. Arbitration proceedings

"(a) The arbitrator shall set a time and place for the hearing and notify the parties not less than 5 days prior to the hearing.

"(b) Any party wishing a stenographic record of the hearing shall—

"(1) be responsible for the preparation of such record;

"(2) notify the other parties and the arbitrator of the preparation of such record;

"(3) furnish copies to all parties and the arbitrator; and

"(4) pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that costs should be apportioned.

"(c)(1) The parties shall be entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

"(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, or other electronic means, if each party has an opportunity to participate.

"(3) The hearing shall be conducted expeditiously and in an informal manner.

"(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

"(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

"(d) No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall assure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policy underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against the offending party as a result of the improper conduct.

"(e) The arbitrator shall make the award within 30 days of the close of the hearing, including the filing of any briefs authorized by the neutral, unless—

"(1) the parties agree to some other time limit; or

"(2) the agency provides by rule for some other time limit.

"§ 590. Arbitration awards

"(a) Unless the agency provides otherwise by rule, the award in an arbitration proceeding shall include a brief, informal discussion of the factual and legal basis, but formal findings of fact or conclusions of law shall not be required. The award shall be filed with all relevant agencies, along with proof of service on all parties by the prevailing party.

"(b) The award shall be final and binding on the parties to the matter, and may be enforced pursuant to section 9 of title 9, United States Code. No action brought to enforce such an agreement may be dismissed nor may relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

"(c) An award entered under this subchapter may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding, nor may the award be used as precedent or otherwise be considered in any factually related proceeding, whether conducted under this subchapter, by an agency, in a court, or in any other arbitral proceeding.

"§ 591. Judicial review of arbitral awards

"(a) Any person adversely affected or aggrieved by an award made in a proceeding conducted under this subchapter may bring an action only pursuant to the provisions of sections 9 through 13 of title 9, United States Code.

"(b) In applying section 10 of title 9, United States Code, the court shall determine whether, in consideration of the factors enumerated in section 582(b) of this title, the consent of the agency to use arbitration to resolve the issue in controversy was a gross abuse of discretion.

"§ 592. Authorization to use services of employees of other agencies

"An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties ot the full or partial cost of the services of an employee.

"§ 593. Qualifications and roster of neutrals; procurement

"(a) After consultation with the Federal Mediation and Conciliation Service, the Community Relations Service of the

Department of Justice, and professional organizations in the area of dispute resolution, the Administrative Conference of the United States may—

"(1) establish standards for neutrals (including experience, training, affiliations, diligence, actual or potential bias or conflicts of interest, and other qualifications) to which agencies may refer;

"(2) maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals, which shall be made available upon request; and

"(3) enter into contracts for the services of neutrals that may be used by agencies on an elective basis in dispute resolution proceedings.

"(b) An agency may contract with any person on a roster established under subsection (a) or a roster maintained by other public or private organizations or individuals for services as a neutral, or for training in connection with alternative means of dispute resolution. An agency may enter into an interagency agreement with the Administrative Conference of the United States to contract for the services of any person on a roster established under subsection (a) to serve as a neutral. The agency shall pay for the services of the neutral. An agency may negotiate a contract for the services of a neutral with any qualified person at compensation that the agency determines is fair and reasonable to the Government.

"§ 594. Support services

"(a) The Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. Agencies shall supply any necessary information to enable the Chairman of the Administrative Conference of the United States to comply with this subsection. The Administrative Conference of the United States shall transmit an annual report to the Congress containing data and recommendations concerning the use of alternative means of dispute resolution.

"(b) The Chairman of the Administrative Conference of the United States may pay all or part of the expenses of using an alternative means of dispute resolution. Such expenses may include, but are not limited to, the costs of neutrals, the costs for certain parties determined to be eligible for assistance under section 595, administrative costs, and training costs. The determinations with respect to payments under this section shall be at the discretion of the Chairman in furthering the use of alternative means of dispute resolution by Federal agencies.

"(c) For the purposes of this subchapter, an agency may use the services and facilities of other Federal agencies and public and private agencies, and individuals (with or without reimbursement) with the consent of such agencies and individuals. An agency may accept such voluntary and uncompensated services without regard to the provisions of section 1342 of title 31, United States Code.

"§ 595. Funding of participation

"(a)(1) Any agency may pay a reasonable amount to enable participation, if the agency determines that—

"(A) it is in the public interest to obtain the participation of one or more persons in an alternative means of dispute resolution; and

"(B) such persons are unable to participate without receiving financial assistance to reimburse expenses.

"(2) In making a determination under paragraph (1) the agency shall consider—

"(A) the need for representation in the proceeding of a fair balance of interests;

"(B) the complexity and importance of the issues involved; and

"(C) the potential savings to the Government of using the particular type of proceeding instead of another procedure to resolve the issue in controversy.

"(b) A person seeking financial assistance, to reimburse expenses of participation in an alternative means of dispute resolution, may submit an application to the Chairman of the Administrative Conference of the United States requesting such assistance. No such application shall be considered by the Chairman, unless the agency notifies the Chairman in writing of a determination under subsection (a) that participation by such person in the alternative proceeding is necessary and in the public interest.

"(c)(1) Agency funds used to defray the travel expenses of any advisory committee as authorized under section 7 of the Federal Advisory Committee Act (5 U.S.C. App. 2) shall be from the general funds of the agency, and not from any amount restricted to travel from appropriations to the agency.

"(2) For the purpose of paragraph (1), the term "advisory committee" shall have the same meaning as such term is defined under section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2).".

(c) TECHNICAL AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER IV—ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

"581. Definitions.
"582. General authority.
"583. Neutrals.
"584. Confidentiality.
"585. Authorization of arbitration.
"586. Enforcement of arbitration.
"587. Arbitrators.
"588. Authority of the arbitrator.
"589. Arbitration proceedings.

"590. Arbitration awards.
"591. Judicial review of arbitral awards.
"592. Authorization to use services of employees of other agencies.
"593. Qualification and roster of neutrals; procurement.
"594. Support services.
"595. Funding of participation.".

SEC. 5. GOVERNMENT CONTRACT CLAIMS.

(a) CONTRACTING OFFICERS.—Section 6(a) of the Contract Disputes Act of 1978 (41 U.S.C. 605(a)) is amended by adding at the end thereof: "The contracting officer shall make all reasonable efforts to resolve a claim or dispute consensually, before or after making a decision under this section.".

(b) ALTERNATIVE MEANS OF DISPUTE RESOLUTION.—Section 7 of the Contract Disputes Act of 1978 (41 U.S.C. 606) is amended—

(1) by redesignating such section as subsection (a) of section 7; and

(2) adding at the end thereof the following new subsection:

"(b) No provision of this Act may be construed to prevent the contractor and a contracting officer from using any alternative means of dispute resolution under subchapter IV of title 5, United States Code, or other mutually agreeable procedures for resolving claims.".

SEC. 6. FEDERAL MEDIATION AND CONCILIATION SERVICE.

Section 203 of the Labor Management Relations Act, 1947, (29 U.S.C. 173) is amended by adding at the end thereof the following new subsection:

"(f) The Service may make services available to Federal agencies to aid in resolution of disputes under the provisions of subchapter IV of title 5, United States Code. Functions performed by the Service may include, but are not limited to, assisting parties to disputes relating to administrative programs, training persons in skills and procedures employed in alternative dispute resolution, and furnishing personnel to act as neutrals, as defined in section 581 of title 5, United States Code. Personnel assigned to act as neutrals shall be qualified in accordance with section 593 of title 5, United States Code. The Service may consult and cooperate with the Administrative Conference of the United States and other agencies in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as necessary to carry out the services authorized in this subsection.".

SEC. 7. GOVERNMENT TORT CLAIMS.

Section 2672 of title 28, United States Code, is amended—

(1) in the proviso at the end of the first sentence by striking out "$25,000" and inserting in lieu thereof "$100,000"; and

(2) inserting after such proviso the following:

"Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of title 5, United States Code, to settle any claim for money damages against the United States, not in excess of $100,000, based on any alleged tort described under the preceding sentence.".

SEC. 8. USE OF NON-ATTORNEYS.

(a) REPRESENTATION OF PARTIES.—Each agency, in developing a policy on the use of alternative means of dispute resolution under this Act, shall identify any administrative program with numerous claims or disputes before the agency and determine—

(1) the extent individuals are represented or assisted by attorneys or by persons who are not attorneys; and

(2) whether the subject areas of the applicable proceedings or procedures are so complex or specialized that only attorneys may adequately provide representation or assistance.

(b) REPRESENTATION AND ASSISTANCE BY NON-ATTORNEYS.—A person who is not an attorney may provide representation or assistance to any individual in a claim or dispute with an agency, if—

(1) such claim or dispute concerns an administrative program identified under subsection (a);

(2) such agency determines that the proceeding or procedure does not necessitate representation or assistance by an attorney under subsection (a)(2); and

(3) such person meets any requirement of the agency to provide representation or assistance.

(c) DISQUALIFICATION OF REPRESENTATION OR ASSISTANCE.—Any agency that adopts regulations under this section to permit representation or assistance by persons who are not attorneys shall review the rules of practice before such agency to—

(1) ensure that any rules pertaining to disqualification of attorneys from practicing before the agency shall also be made applicable as appropriate to other persons who provide representation or assistance; and

(2) establish effective agency procedures for enforcing such rules of practice and for receiving complaints from affected persons.

SEC. 9. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Administrative Conference of the United States to carry out the purposes of this Act amounts not in excess of $1,000,000 for each of the fiscal years 1989, 1990, and 1991.

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Senator HEFLIN. The first panel includes the Honorable Marshall Breger, who is the Chairman of the Administrative Conference of the United States; the Honorable Kay McMurray, Director of Federal Mediation and Conciliation Service; Mr. Lester Edelman, who is the chief counsel, U.S. Army Corps of Engineers; Professor Walter Gellhorn, Columbia University Law School, and Mr. Robert Coulson, of the American Arbitration Association.

We will hear from you first, Mr. Breger.

STATEMENT OF A PANEL INCLUDING HON. MARSHALL J. BREGER, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, WASHINGTON, DC; HON. KAY McMURRAY, DIRECTOR, FEDERAL MEDIATION AND CONCILIATION SERVICE, WASHINGTON, DC; LESTER EDELMAN, CHIEF COUNSEL, U.S. ARMY CORPS OF ENGINEERS, WASHINGTON, DC, AND PROF. WALTER GELLHORN, COLUMBIA UNIVERSITY LAW SCHOOL, NEW YORK, NY

STATEMENT OF MARSHALL J. BREGER

Mr. BREGER. Thank you very much, Mr. Chairman.

You have my written testimony. My oral remarks will be brief, as I realize you have a very extensive schedule of testimony today.

We are delighted that this committee is considering S. 2274, the bill to encourage mediation, conciliation, arbitration, and other alternative dispute resolution techniques, because we think it is an important step forward in the evolution of the administrative law system in this country toward both more justice and more efficiency for participants in the administrative process.

Abraham Lincoln, writing about the litigation process, once wrote that one should do all one can to discourage litigation:

> Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.

I need not speak at length about the problems of litigation delay and expense, Mr. Chairman, to you who have had such great experience in that area. I think it is important to point out that, in the trial courts and in the Federal courts generally, numerous experiments have begun and are continuing to move toward alternate dispute resolution techniques.

The Federal Government, however, has done little to take account of the wisdom of Abraham Lincoln. The system is not set up to encourage settlement. It is not set up to encourage conciliation. It is set up to encourage delay and litigation; this bill is a first step in changing both the law and, as important, the bureaucratic and administrative mindset, because much of what this law does is consciousness-raising. It makes clear that in the view of Congress, alternate dispute resolution techniques are appropriate for Federal agencies.

Now, before Congress passed the Arbitration Act in 1925, the courts were very uncertain about arbitration. Once Congress put its imprimatur on arbitration through the Federal Arbitration Act, the courts began to say, well, private arbitration is an appropriate thing to do. We think that S. 2274 will serve the same purpose.

The bill will also specifically make changes in statutes to make settlement and conciliation much easier. It will allow agencies to settle more cases under the Federal Tort Claims Act, raising from $25,000 to $100,000 the limit on agency settlements within DOJ approval. The FTCA now requires agencies to have settlements over $25,000 approved by the Department of Justice, and makes it very difficult for two lawyers to sit down, make an agreement, and shake hands on it.

It will change the Contract Disputes Act to allow for arbitration where appropriate, and it will change the Administrative Procedure Act to explicitly authorize an administrative law judge to inform parties about alternate dispute resolution techniques, to hold conferences for the use of such techniques, and to require the attendance of a party's representative who has the authority to negotiate concerning an issue in controversy.

In sum, it will encourage, both by spirit and by language, movement away from adversariness in litigation and allow for a more efficient and, we think, greater justice for the average person, because of greater opportunity to take advantage of the administrative law process.

Thank you very much, Mr. Chairman.

[Statement of Mr. Breger follows:]

TESTIMONY
OF
MARSHALL J. BREGER

Chairman
Administrative Conference of the United States

on S. 2274

The Alternative Dispute Resolution Act of 1988

before the
Subcommittee on Courts and Administrative Practice
Committee on the Judiciary
United States Senate

May 25, 1988

My name is Marshall J. Breger, and I serve as the Chairman of the Administrative Conference of the United States. Accompanying me are Gary J. Edles, legal counsel of the Conference, and senior staff attorney Charles Pou. While the views I am expressing are those of the Conference and not the Administration, I am pleased to be with you to testify on S. 2274, the Administrative Dispute Resolution Act of 1988. I would like to thank you for this opportunity to discuss a subject that is important to me personally and central to the goals of the Administrative Conference. I am speaking, of course, of improving the means by which federal agencies resolve disputes. I am convinced that what has come to be known as "ADR" — alternative means of dispute resolution — is very valuable, and that many — probably most — federal agencies can and should be doing more to build these methods into their own decisionmaking and problem solving processes.[1] The Administrative Dispute Resolution Act will go far to encourage thoughtful use of ADR and to make agency practice simpler and more productive for everyone involved.

The Utility of ADR

The Administrative Conference has been in the forefront of efforts to encourage agency use of ADR. In 1982, we recommended that federal agencies consider the use of negotiation among affected parties as a means of drafting proposed regulations for agency consideration.[2] That same year we recommended that agencies provide informal procedures in lieu of traditional adjudication to resolve disputes under federal grant programs.[3] And in 1986 we undertook what is perhaps our most comprehensive examination of the subject and recommended that administrative agencies adopt alternative methods of resolving a broad range of disputes.[4] We are pleased that S. 2274 would enact into law a number of the Conference's specific recommendations.[5]

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[1] The attached Conference Recommendation 86-3, 1 CFR § 305.86-3, describes these methods, which include mediation, factfinding, conciliation, minitrials and arbitration.

[2] *See* 1 CFR § 305.82-4: Procedures for Negotiating Proposed Regulations (Recommendation 82-4).

[3] *See* 1 CFR § 305.82-2: Resolving Disputes Under Federal Grant Programs (Recommendation No. 82-2).

[4] *See* 1 CFR § 305.86-3: Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3).

[5] In addition to those listed in the footnotes above, these include Conference Recommendations 87-11, Alternatives for Resolving Government Contract Disputes, 1 CFR § 305.87-11; 87-5, Arbitration in Federal Programs, 1 CFR § 305.87-5; 86-8, Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution, 1 CFR § 305.86-8; 84-7, Administrative Settlement of Tort and Other Monetary Claims Against the Government, 1 CFR § 305.84-7.

Our studies of the use of ADR in various contexts have convinced us that appropriate use of ADR methods throughout the federal government will:

- enhance the responsiveness of agencies,
- increase the acceptability of their decisions, and
- help reduce the contentiousness, delay, and expense often associated with agency decisionmaking.

Our study of ADR also persuades us that the same forces that have made these methods attractive to private disputants render them useful in many cases that federal agencies decide, or to which the government is a party.

The need for simplified dispute resolution processes is underscored by the growth in federal regulatory schemes and related litigation. Federal agencies are now involved in tens of thousands of disputes as parties, and also decide far more cases than the federal courts — hundreds of thousands annually. This fact is the result of an immense growth in recent years of controversies that manifest themselves in formal agency proceedings, myriad regulatory decisions, and court actions challenging agency decisions or seeking enforcement of legislative or administrative requirements. While many portions of the administrative process were created to provide a range of dispute resolution alternatives to court litigation, in many eyes they have themselves become a part of the problem. Numerous government decisions now require resource-intensive procedures that are expensive, cause delay, reduce the chances of resolution, and disrupt planning and management for both the agency and the private parties involved.

A few may argue that there really is no "litigation crisis" over which to concern ourselves. There can be no doubt, though, that conventional litigation is often time consuming and costly to all the parties involved. Equally important, the transaction costs of our country's litigiousness divert crucial national resources into proliferating legal and bureaucratic processes, and have likely harmed the competitive position of the United States in markets abroad and cut productivity at home.

Available data show that several agencies have already used ADR methods in ways that have saved time, reduced costs, and produced fair results. I do not suggest that the various ADR techniques are a panacea. The Conference's efforts in ADR are intended to make dispute resolution in the federal administrative process more efficient and more satisfying to the parties involved. We seek, as Abraham Lincoln succinctly put it, to

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."[6]

Some doubters have also raised concerns that resolving many disputes through informal means will fail to yield precedents for future jurists, that such procedures may undermine predictability, that mediation or arbitration will produce inaccurate decisions, or that ADR may contravene the public interest via secret negotiations. These concerns deserve close attention, because ADR should not be abused so as to promote outcomes that are unreviewable, unfair, or against the public interest. For many kinds of cases, litigation will remain necessary or even the dispute resolution mechanism of choice. We are talking here about building in complementary resolution methods, not usurping current adjudicatory procedures.

Some critics of ADR have suggested that governmental conflicts differ so greatly from private ones that ADR is not very applicable, either wholly or in most cases. A few go so far as to argue that certain kinds, like arbitration, endanger the public fisc or may be unconstitutional. Others declare categorically broad classes of cases (e.g., those involving government claims or civil rights) to be inappropriate. They fear that settlements reached with ADR risk excessively ad hoc procedures, inaccurate results, second class justice, and reduced predictability.

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[6] The Collected Works of Abraham Lincoln, Vol. II, pp. 81-82 (T. Basler, et al.ed. 1953-55).

These critics raise arguments worthy of answer. The totality of their fears, however, fails to make the case that ADR is not a needed complement to our dispute resolution arsenal.

First, let me deal with the "legality" concerns. These obstacles, if they are real, surround *only* arbitration and no other forms of ADR, because arbitration is the only form that actually shifts any decisionmaking into private hands. The possible objections to arbitration are that (1) federal executive authority, as defined in *Buckley v. Valeo*, 424 U.S. 1 (1976), is delegated outside the government, (2) judicial power under Article III of the Constitution is placed in private hands, and (3) private arbitration may violate the requirements of due process. Mr. Chairman, these concerns cannot be given short shrift, and the Conference has commissioned Harold Bruff of the University of Texas Law School to examine these issues in detail. His report analyzed these constitutional issues and suggested ways to structure arbitral processes to minimize concerns. Like the Conference, he concluded that use of arbitration in many agency cases is permissible if it is confined to appropriate issues, provides for some executive oversight, and ensures quality decisions.[7] For example, cases subject to arbitration should involve questions of fact or the application of well-established norms, even if statutory. Generally they should not involve precedential issues or the application of fundamental legal norms that are evolving. With these kinds of safeguards, arbitration can, I am confident, be employed consistent with the law and the government's interests.

Delegation to private arbiters of decisions involving government claims already have been approved in several important instances. Arbitration under FIFRA and of many federal employees' labor grievances have not been constitutionally problematic. The Medicaid scheme whereby private providers decide claims over government reimbursement for health care[8] has also been explicitly approved. *Schweiker v. McClure*, 456 U.S. 188 (1982). Many federal contract claims were decided by early Board of Contract Appeals members who were only part-time government employees, and

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[7] Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs, 1987 Recommendations and Reports of the Administrative Conference ____ (1988); 1 CFR § 305.87-5: *Assuring the Fairness and Acceptability of Arbitration in Federal Programs* (Recommendation 87-5).

[8] 42 U.S.C. § 1395u (1982).

Congress has directed that most of the Education Appeal Board's members (who decide grant disputes) be from outside the government.[9] The concerns raised should inhibit neither most agency attempts to use these methods nor our present efforts to stimulate them.

Some have expressed doubts about ADR's impact on the rights of less powerful members of our society, fearing that these persons may be pressured by a mediator to accept less than their due (or, in any case, less than they might win at a full trial). More radical critics have even criticized consensual means of dispute resolution as "diverting attention from structural conflict" in society. Even putting aside the most doctrinaire objections, I see little point in dismissing so broadly an initiative that seeks to prevent human frustration and to ensure that case outcomes meet the real needs of the people involved rather than certain formal adversary procedures. If the only route a grievant has is an expensive, procedurally complex hearing process, the ordinary citizen may often chose to "lump it." ADR methods offer additional routes to justice, and can provide opportunities to resolve the social problems of those who choose to focus on their grievances rather than their abstract claims. S. 2274, in addition, is wholly voluntary, so that no one need ever resort to ADR without making a knowing choice to do so.

Some have contended that ADR settlements may endanger the public "fisc," or that private arbitrators cannot possibly understand and comply with the "web" of statutory and regulatory limits on agencies. Private arbitrators, like agency disbursing officers, have access to Comptroller General opinions on particular expenditures, and to Offices of General Counsel.

We should recognize also that an equivalent "web" of constitutional, statutory, administrative, private, and judge-made law binds arbitrators who resolve private cases daily. Public sector labor arbitration under CSRA and other laws has worked well, subject to many added restraints. We should underestimate neither the extent to which arbitrators can come to grasp, or be educated as to, applicable restrictions, nor the extensive array of watchdogs in GAO, inspector general offices, Congress and elsewhere to bring abuses to light.

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[9] 20 U.S.C. § 1234(c) (1982).

I am confident that sensible processes can be developed, where needed, to allow the use of ADR without undermining decisional accountability or compromising public confidence in the administrative process. For example, agency officials already routinely negotiate and adjust tens of thousands of disagreements over contracts, penalty assessments, and other major decisions pursuant to guidance that is generally viewed as adequate. To take one instance, the Office of the Inspector General at the Department of Defense has specifically endorsed the documentation standards developed by the Administrative Conference for ADR in contract claims; indeed, that Office specifically approved the use of ADR in one large, controversial case by the Corps of Engineers as being in the government's best interest. Criticizing current dispute procedures, the Inspector General applauded the Corps' innovative approach and predicted "good things ahead" for the Corps' program. The Environmental Protection Agency has likewise been pursuing alternatives to conventional litigation with considerable success. What these examples demonstrate is that, in the federal arena, the mere existence of a formal dispute or presence of a mediator does not render suspect the consensual settlement worked out by the parties.

ADR processes, I should note, are also now being used at the state level to good effect in a variety of private sector cases. Methods have included court-annexed arbitration, "multi-door courthouses," summary jury trials, minitrials, labor and commercial arbitration, and neighborhood justice centers. To date, over twenty state legislatures have enacted laws establishing statewide mediation centers or other dispute resolution options.

Indeed, with little fanfare, several states have been considerably more imaginative than the federal government in carrying out government-based experiments with these dispute resolution methods. Of course, public labor mediation or arbitration is more common at the state level, as are a variety of other uses for mediation and other ADR skills in particular states. Some examples are following negotiated investment strategies to fix budgetary priorities, negotiating disputes over siting of industrial, hazardous waste or other facilities, and arbitrating some consumer and other claims. In five states, central dispute resolution agencies have been established. The agencies' missions and accomplishments vary considerably, but they may generally be said to engage in building agency and public awareness of dispute resolution options, mediating disputes, settling up mediation and negotiation programs, consulting with interested state agencies, suggesting legislation, and compiling rosters.

The Need for Legislation

The Administrative Dispute Resolution Act, perhaps first and foremost, places a congressional imprimatur on the use of alternatives to conventional litigation. It tells agencies, in effect, that they now have many arrows in their dispute resolution quiver — and that they are encouraged to use whatever arrow is most useful. In my view, the bill would go far to shape a positive government policy that encourages informed public sector use of ADR — much as the U.S. Arbitration Act of 1925[10] did for arbitration in many private sector disputes. It will encourage agency personnel to make more productive use of mediation or other processes. While the Congress has on a few occasions encouraged agencies to make use of ADR,[11] it has also at times saddled them with decisional procedures that can only be viewed as procrustean. In addition, GAO has (without justification, in the view of the Administrative Conference and many experts) gone so far as to interpret Congress' general silence as a flat prohibition of some kinds of ADR, including arbitration. S. 2274 will eliminate this harsh presumption, validate the examples set by innovators like those at the Environmental Protection Agency and the Army Corps of Engineers, and encourage other agencies to act.

The main procedural thrust of the Act is to foster the use of flexible alternatives. This approach will allow the parties to shape procedures to meet their needs, on a case by case basis. Although the Act potentially applies to all kinds of disputes relating to agency administrative programs, S. 2274 is based wholly on the principle of consent — every process addressed in the bill can be invoked only with the knowing agreement of the parties, including the Government.

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[10] 9 U.S.C. §§ 1-14 (1982).

[11] Examples include the labor and civil rights responsibilities assigned to the Federal Mediation and Conciliation Service, the Community Relations Service of the Department of Justice, and the National Mediation Board. Other cases where Congress has encouraged these methods include the Civil Service Reform Act's admonition to the Merit Systems Protection Board to experiment with consensual methods, and explicit arbitration authority for some Superfund, pesticide-related, and other environmental disputes. Most recently, Congress in January 1988 required the U.S. Department of Agriculture to reverse itself and submit to state-mandated farmer-lender mediation, and to offer matching grants to help support such mediation programs in as many states as possible. The results here may prove more effective than those under the Dispute Resolution Act of 1980, which came to naught when no funds were appropriated to carry out its goals.

A corresponding premise of the Act is that the grant of maximum procedural discretion should not undermine agency accountability. The Act recognizes at the outset that certain kinds of government decisions will not be appropriate for ADR, and seeks to help agencies delineate those kinds of cases that are appropriate. (Section 582(b)) Agency decisions to employ ADR would be reviewable pursuant to these criteria after entry of the final order, but only under a restricted standard of judicial review. This will give agencies great flexibility without giving up an ultimate check by the judiciary. In addition, the Act's reporting requirement (discussed below) will enable Congress to oversee ADR use and deal with problems that occur in practice.

Specific Comments on the Bill

Title I of the Act encourages each agency to review its dispute resolution processes and to promulgate policies that address the use of the full range of dispute resolution methods, including mediation, conciliation, minitrials, factfinding, arbitration, and negotiated rulemaking. Section 101 encourages agencies to consult with the Administrative Conference, the Federal Mediation and Conciliation Service, and professional associations in developing these policies. The Act also calls for training key employees in negotiation and ADR skills, and for designating a senior official to assume responsibility as agency dispute resolution specialist and implement policies adopted under section 101.

Beyond these rudimentary steps, the Act's watchword is voluntariness. ADR methods will ultimately succeed only if federal officials and the affected parties come to view them as useful tools; forcing agencies or other parties to use them will merely create resistance. The Act recognizes this fact — while it creates a milieu in which agencies can more readily experiment, little is actually mandated except that they think about ways to do so.

The Act adds a new chapter to the Administrative Procedure Act on "ADR in the administrative process." This chapter addresses comprehensively issues arising in agency use of

ADR. Except in the case of arbitration, traditionally the most formal, or "trial-type," of ADR processes, the Act refrains from mandating specific procedures. It leaves the parties discretion to fit the process to the case. Even in the case of arbitration the procedural prescriptions are quite flexible, while specifying the hearing and judicial review procedures, arbitrator's authority, and the means to enforce arbitration agreements. The bill also includes appropriate guarantees of confidentiality for communications made in the course of ADR proceedings.

The Act amends Section 556 of the Administrative Procedure Act, on adjudication, explicitly to authorize an administrative law judge:

1. To inform the parties as to the availability of ADR and encourage its use,
2. To hold conferences for use of ADR, and
3. Where the parties have agreed to an ADR conference, to require the attendance of a party's representative who has the authority to negotiate concerning issues in controversy.

The APA probably already permits these procedures if agencies chose to invoke them. But it is useful to give them a firm statutory foundation. A number of federal district court judges have recognized the benefits of such approaches in handling their own caseloads.

The Act amends the Federal Tort Claims Act to authorize arbitration and other ADR methods, at both agency and court levels, in claims for less than $100,000. It increases the level of agencies' authority to settle without prior Department of Justice approval to $100,000 from the current level (set decades ago) of $25,000. This will encourage negotiations and reduce litigation. The Act amends the Contract Disputes Act to authorize voluntary arbitration and other forms of ADR in some cases and to encourage agencies' contracting officers and other responsible officials to make all reasonable efforts to resolve claims consensually. The Act expands the authority of the FMCS — currently limited almost exclusively to private sector labor disputes — to allow FMCS mediators to aid agencies in resolving disputes relating to any federal program. S. 2274 encourages agencies to provide, pursuant to specified safeguards, more opportunities for using persons other than lawyers to represent individuals in certain cases before an agency. It simplifies the procedures for agencies' finding and contracting with private mediators and other neutrals, and gives agencies greater authority to avail themselves of volunteer services and to hire qualified neutrals. We fully support these steps, several of which, as I noted earlier, expressly implement recommendations of the Administrative Conference.

The Conference Role in ADR

The Act also gives the Conference important new support roles to assist agencies wishing to employ consensual dispute resolution methods. The Conference would be authorized to establish optional standards for ADR neutrals in federal administrative programs, to establish a roster of qualified neutrals and make it available to interested agencies, and to enter into task order contracts for the services of neutrals that may be used on an expedited basis by other agencies. If one thinks of the Conference's task as encouraging "R & D" in the field of administrative law, these activities would be "development" supplementing our traditional "research" role of studying and recommending improvements. The Conference has been somewhat reluctant in the past to take on operational responsibilities for fear that they might divert resources otherwise needed to advance our primary mission as the government "think tank" on administrative process issues. But the Conference, in its ADR recommendations, including one issued only last December,[12] explicitly decided that we need to assume at least a temporary operational role in order to get ADR programs off the ground. These steps will simplify and expedite acquisitions of the services of mediators and other ADR neutrals by many agencies.

The Conference is also directed in the Act to compile data and to report annually to Congress on agencies' use of ADR methods. This will be a valuable resource for informed congressional oversight and will help agencies interested in evaluating their own experiences or in learning from those of others.

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[12] *See* 1 CFR § 305.87-11: Alternatives for Resolving Government Contract Disputes (Recommendation 87-11).

The Conference also would receive authority to pay all or part of the expenses of a particular agency's uses of ADR, including the costs of neutrals, training, and participation of certain crucial parties who would be unable to participate without assistance.

Finally, the Conference will address the organizational uncertainty about how ADR processes will impact on the roles and functions of agencies. The Administrative Conference's membership structure — bringing together as it does government officials and general counsels, private sector representatives and academic experts — makes it an especially apt vehicle to help agencies deal with such concerns. The Conference can assist and give impetus to other departments by promoting awareness, working to bring public and private sectors together, and aiding agencies that develop an interest in resolving conflicts more effectively and expeditiously. S. 2274 recognizes, and enhances, the unique opportunities the Conference affords for moving regulatory agencies to improve.

To accomplish these new missions, the Act authorizes increased appropriations to the Conference in the amount of $1,000,000 for each of the fiscal years 1989, 1990, and 1991. I anticipate that, in 1988 and 1989, the Conference would rely on its current appropriations.

These expanded activities will plainly mark a milestone in the Administrative Conference's continuing work to help improve agency dispute resolution. As I noted earlier, the Conference began sustained ADR efforts with negotiated rulemaking, where its 1982 and 1985 studies and recommendations stimulated a growing number of agencies to experiment. "Reg-neg" has since emerged in some agencies, such as EPA and FAA, as a leading alternative to more traditional rulemaking techniques. The Conference subsequently expanded its focus, called formally for greater use of ADR in agency litigation, and recommended ways for agencies to take greater advantage of mediation, minitrials, settlement judges, organizational streamlining and other means now at their disposal to encourage settlement of many conflicts. (Rec. 86-3) Other recently completed research projects have led to Conference recommendations on training and hiring "neutrals" for ADR in government disputes (Rec. 86-8), negotiating Superfund cleanups (Rec. 84-4), making agency handling of tort claims less arbitrary (Rec. 84-7), and resolving contract disputes

(Rec. 87-11), as well as an evaluation of expedited procedures for employee grievances at the Merit Systems Protection Board. Several ADR research projects are ongoing. We have even received *pro bono* from major law firms assistance on several projects.

Recently the Conference sponsored, with the assistance of nine other agencies, a government-wide colloquium on agency dispute resolution, whose proceedings have been published in the American University *Administrative Law Journal*. Additionally, we have compiled and published our *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution*, held a seminar on issues in federal dispute resolution legislation, chaired an ongoing inter-agency working group on negotiated rulemaking. These activities reflect the Conference's commitment to outreach and "consciousness-raising" on this issue. To the extent permitted by available funding, the Administrative Conference is committed to a program that will build on the credibility we have already established among our fellow agencies to encourage ADR use.

Conclusion

In concluding, let me reiterate that the costs, delay, and inefficiency that have characterized much federal agency activity should be treated as important public policy concerns in their own right and not merely as procedural afterthoughts to consideration of substantive regulatory issues. Federal agencies should be encouraged to use — and certainly not discouraged from using — these innovative processes to help the parties themselves reach timely, acceptable, and informed decisions consistent with the public interest. Former Deputy Attorney General Arnold I. Burns recognized the value of ADR when he stated,

> "In the long term, nothing less than a retooling of the roles of lawyers can be accepted, particularly government lawyers. This retooling should deemphasize adversarial behavior and give greater weight to the lawyer as problem solver and negotiator who can resolve controversies before they escalate into major disputes or proceed to a full hearing. This is the central challenge of the legal profession."

The challenge also applies to us — those persons connected with the administration of justice — and if we fail to embrace opportunities for experimentation which can reduce the adversary nature of our legal system, history will judge us harshly. If we were to return and examine some parts of the government in a dozen years, I have no doubt that many of the consensual solutions now under discussion almost certainly will be effectively and productively in place. What remains open is whether the Congress and other key decisionmakers will be seen to have had a share in shaping this future by embracing the promise of improved dispute resolution and encouraging much wider, and much more effective, usage.

At this point, I will be glad to respond to any questions you may have.

Senator HEFLIN. Mr. McMurray?

STATEMENT OF KAY McMURRAY

Mr. McMURRAY. Mr. Chairman, Senator Grassley, we sincerely appreciate the opportunity to appear before you and comment on the legislation here under consideration.

The administration has not as yet made up its mind on and is continuing to review the legislation, so my comments will be relegated to just the efficacy of mediation and other methods of dispute resolution.

We at the Federal Mediation and Conciliation Service have nearly 40 years of experience in providing mediation and arbitration assistance in labor disputes. Based on our experience as a provider of mediation services, as well as my own experience as a labor negotiator, mediator and arbitrator, I know that mediation works. And that arbitration can be a cost-effective method for resolving arguments.

FMCS was established in 1947 to mediate labor-management disputes. But we also assist parties to resolve problems outside the crisis atmosphere of contract negotiations through preventive mediation and consultation.

We provide mediation services in about 8,500 specific cases each year, and in the vast majority of them, the parties are able to resolve their dispute without resort to a strike or a lockout. As a matter of fact, less than 4 percent of them go beyond the mediation process.

Our mediation is voluntary. That is, we have no power, other than the power of persuasion, to make the parties meet, or to reach agreement. And yet, perhaps because the mediator does not have power and cannot dictate the terms of the settlement, both labor and management welcome the assistance of a mediator.

In addition to our mediation services, FMCS maintains a list of qualified private labor arbitrators. Parties can request lists of individuals listed on our roster. Persons selected by the parties will arbitrate their contract grievance disputes.

In fiscal year 1987, for example, we provided 33,000 panels, the parties selected approximately 12,000 arbitrators, and nearly 4,500 awards were issued. As these numbers indicate, collectively bargained grievance arbitration is well-established and widely used in our field.

Based on our experience, we believe that many disputes can and should be settled by the parties with the assistance of a neutral third party.

Mediation is the process by which the parties settle their own dispute with the assistance of a neutral, uninvolved party. Arbitration, on the other hand, is adjudication by a neutral, usually selected by the parties. There are now many other types of alternate dispute techniques, such as mini-trials, court-annexed mediation, and arbitration, and so on. FMCS mediates a large number of disputes, and I will speak about this process briefly.

We believe that most disputes in many fields can be settled by the use of various alternate dispute resolutions. Obviously, disputes which are settled by the parties are most satisfactory to both sides, because the parties have shaped the resolution themselves.

FMCS has experience in mediating in other areas beyond labor disputes. Long before the current interest in alternative dispute resolution, the Service provided various kinds of assistance in areas such as Native American land disputes, landlord-tenant disputes, homeowner-contractor disputes, and many others. More recently, the Service has been active in local situations with a significant number of mediators volunteering as community mediators or providing training to other various groups of mediators.

Since 1979, we have been directly responsible for the mediation of age-related complaints under regulations of the Department of Health and Human Services. Their regulations implementing the Age Discrimination Act of 1975 require the mediation and/or investigation of age discrimination complaints against organizations with federally funded programs. FMCS is reimbursed by Health and Human Services for the full cost of alternate dispute mediation services. We have been successful in resolving a substantial number of those complaints.

In addition, our mediators have participated in several negotiated rulemaking proceedings, such as the Environmental Protection Agency asbestos rule, the Federal Aviation Administration flight time/duty time rule, an Occupational Health and Safety, OSHA, chemical rule, and the Department of Transportation rule involving handicapped airline passengers.

The FAA negotiated rulemaking gives an illustrative example of what can be accomplished. In the past—and I have had personal experience with this, because I represented the pilots for a number of years—we had numerous committees of Government, management and labor, to try and determine a better way of establishing flight time/duty time limitations in flight cockpits. Normally, these people would meet, the management and the union would bargain collectively, the Government would step in, the argument would start, and then it would all go away and no rule would be proposed.

This time around, FMCS assisted and a mediator worked with the parties for several months. As a result, the FAA now has a new flight time/duty time rule for the first time since the first one was established over 30 years ago.

In a free society, there is no better method than to have people involved in a dispute sit down, face to face, and work out their disagreements, either with or without the aid of mediation. Almost everyone in this field agrees that an agreement negotiated by the parties is the best form of dispute resolution. People then have an agreement they made and they can live with. Since the parties are responsible for the agreement, they make it work. A mediator can provide the additional assistance by which the parties reach an agreement, and without the use of costly and time-consuming litigation.

To measure the value of mediation, one must first assess the value of negotiation as a means of dispute resolution. Negotiation has the essential value of being a process in which the interested parties are directly involved. The value of mediation is that it helps make the negotiation process work well. Although it may be necessary for a mediator to acquire some substantive knowledge about the area of the dispute, the most effective mediator is someone who can help the parties make their own agreement by showing them how to use the negotiating process. The mediator has control over the procedural aspects of the meeting, but it is the parties who fashion and accept the terms of the agreement. The mediator gives the parties the necessary means to do the job more successfully.

Successful mediation, at FMCS and elsewhere, has been a part of the American labor relations system for over 40 years. We believe that this process—and experience—can be useful to parties in other kinds of disputes. We are, of course, ready and able to assist Federal agencies in resolving their disputes through the use of time-tested methods. And we sincerely believe that the alternate dispute area of resolution is a growing field and will be very productive.

Thank you.

[Statement of Mr. McMurray follows:]

TESTIMONY
OF
KAY McMURRAY

DIRECTOR
FEDERAL MEDIATION AND CONCILIATION SERVICE

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

May 25, 1988

Mr. Chairman, members of the subcommittee, thank you for inviting me to testify about the value of mediation and arbitration, and their usefulness in resolving many of the kinds of disputes in which the Federal government is involved. The Administration is continuing to review S. 2274, the Administrative Resolution Act of 1988, consequently, my comments at this point will be limited to our experience in assisting in dispute resolution.

We at the Federal Mediation and Conciliation Service have nearly forty years of experience in providing mediation and arbitration assistance in labor disputes. Based on our experience as a provider of mediation services -- as well as my own experience as a labor negotiator, mediator and arbitrator -- I know that mediation works, and that arbitration can be a cost-effective method for resolving arguments.

The Federal Mediation and Conciliation Service was established in 1947 specifically to mediate labor-mangement disputes. FMCS also assists parties to resolve problems outside the crisis atmosphere of contract negotiations through preventive mediation and consultation. We provide mediation services in about 8,500 cases each year. And in the vast majority of them the parties are able to resolve their dispute without resort to a strike or a lockout.

FMCS mediation is voluntary. That is, we have no power, other than the power of persuasion, to make the parties meet*, or to reach agreement. And yet, perhaps because the mediator does not have power, and cannot dictate the terms of a settlement, both labor and management welcome the assistance of a mediator.

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*Except in health care cases, where the parties may commit an unfair practice if they fail to attend a negotiation session called by a mediator. Even in such situations, however, the mediator has no power to force an agreement.

In addition to our mediation services, FMCS maintains a list of qualified private labor arbitrators. Parties can request lists of individuals listed on our roster. Persons selected by the parties will arbitrate their contract grievance disputes. In FY 1987, FMCS provided about 33,000 panels, and parties selected about 12,000 arbitrators. Nearly 4,500 awards were issued. As these numbers indicate, collectively-bargained grievance arbitration is well-established and widely used.

FMCS is also responsible, under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), to provide arbitrators for pesticide data disputes. Because FMCS did not have a panel of arbitrators qualified to hear these kinds of technical disputes, we have arranged with the American Arbitration Association to use their panels of arbitrators.

Based on our experience, we believe that many disputes can, and should, be settled by the parties, with the assistance of a neutral third party.

Mediation is the process by which the parties settle their own dispute with the assistance of a neutral, uninvolved party. Arbitration, on the other hand is adjudication by a neutral, usually selected by the parties. There are now many other types of "ADR Techniques", such as mini-trials, court annexed mediation and arbitration and so on. FMCS mediates a large number of disputes, and I will speak about this process.

We also believe that most disputes in many fields, can be settled by the use of various ADR techniques, especially mediation. Obviously, disputes which are settled by the parties are most satisfactory to both sides, because the parties have shaped the resolution themselves.

FMCS has experience in mediating in other areas beyond labor disputes. Long before the current interest in alternative dispute resolution, the Service provided various kinds of assistance in areas such as a Native American land dispute, landlord-tenant disputes, homeowner-contractor disputes, and many others. More recently the Service has been active in local situations with a significant number of mediators volunteering as community mediators or providing training to various groups of mediators.

Since 1979, FMCS has been directly responsible for the mediation of age-related complaints under regulations of the Department of Health and Human Services (HHS). HHS regulations implementing the Age Discrimination Act of 1975 require the mediation and/or investigation of age discrimination complaints against organizations with federally funded programs. FMCS is reimbursed by HHS for the full cost of ADA mediation services. FMCS has been successful in resolving a substantial number of those complaints.

In addition, FMCS mediators have participated in several negotiated rulemaking proceedings, such as the Environmental Protection Agency (EPA) asbestos rule, and the Federal Aviation Administration (FAA) flight time/duty rule, an Occupational Health and Safety Administration (OSHA) chemical rule and the Department of Transportation (DOT) rule involving handicapped passengers. The FAA negotiated rulemaking gives an illustrative example. In the past, efforts at reaching agreement on the FAA's broad responsibilities in airline safety regulation failed because pilots would disagree with management, the Government would get involved, and the process would break down. In 1984, the then new FAA Administrator discussed mediating the flight time regulation. An FMCS mediator was assigned to assist the parties, and with the assistance of mediation, a new regulation was completed. This is an example of what can be accomplished through negotiated rulemaking. FMCS is able to offer its mediation services to other government agencies and receive reimbursement for these services pursuant to provisions in Title 31 which authorize agencies to perform work or services for other agencies. Thus, FMCS has had considerable experience with regulatory negotiations, and based on this experience, we know the process works.

In a free society, there is no better method than to have people involved in a dispute sit down face to face and work out their disagreements, either with or without the aid of mediation. Almost everyone in this field agrees that an agreement negotiated by the parties is the best form of dispute resolution. People then have an agreement they made and they can live with. Since the parties are responsible for the agreement; they make it work. A mediator can provide the additional assistance by which the parties reach an agreement, without the use of costly and time consuming litigation.

To measure the value of mediation, one must first assess the value of negotiation as a means of dispute resolution. Negotiation has the essential value of being a process in which the interested parties are directly involved. The value of mediation is that it helps make the negotiation process work well.

Although it may be necessary for a mediator to acquire some substantive knowledge about the area of the dispute, the most effective mediator is someone who can help the parties make their own agreement by showing them how to use the negotiating process. The mediator has control over the procedural aspects of the meetings, but it is the parties who fashion and accept the terms of the agreement. The mediator gives the parties the necessary means to do the job more effectively.

Successful mediation, at FMCS and elsewhere, has been a part of the American labor relations system for over forty years. We believe that this process -- and experience -- can be useful to parties in other kinds of disputes. FMCS is ready and able to assist Federal agencies in resolving their disputes through the use of these time-tested methods.

I believe that mediation can improve dispute resolution in Federal programs, and may help reduce the backlog of cases in agencies and the courts. For, as was said a long time ago, "Suits at court are like winter nights, long and wearisome." (Thomas Deloney in Jack of Newburg, 1597). We can do better.

Senator **Heflin**. Mr. Edelman.

STATEMENT OF LESTER EDELMAN

Mr. **Edelman**. Mr. Chairman and Senator Grassley, I am Lester Edelman, the chief counsel of the U.S. Army Corps of Engineers. With me in the row behind are Frank Carr, our chief trial attorney, and Dr. Jerome Delli Priscoli, a senior policy analyst from the Corps of Engineers Institute for Water Resources

I appreciate this opportunity to appear before you to testify on alternative dispute resolutions, or ADR as it has come to be known. The administration is continuing its review of Senate 2274, the Administrative Dispute Resolution Act of 1988. However, I want to share with you why and how the Corps of Engineers uses ADR.

The chairman and members of the subcommittee deserve a great deal of praise for considering ADR as an effective alternative to the costs, delays and disruptions of litigation. Your interest in ADR will do much to support the use of ADR by Federal agencies and to put a stamp of approval on this concept. Merely by holding this hearing and even without legislation, you will help spread the word to other Federal agencies that ADR programs are acceptable.

Although the Corps of Engineers has explored the use of ADR in many areas, our initial use and certainly our most comprehensive experience has been in the area of contract disputes. Accordingly, in my prepared statement, I address our experience in this area of disputes resolution.

In my prepared statement, I also discuss our reasons in the Corps for using ADR. I note that in contract claims litigation, we have successfully used minitrials and nonbinding arbitration and our expectation to use dispute resolution panels. I further comment on our successful use of ADR in environmental disputes.

On pages 27 and 28 of our statement, I indicate that we were preparing for a minitrial between the Goodyear Tire and Rubber Company and the Corps, involving the resolution of responsibility for contamination at a site in Arizona formerly used by the Navy during the 1950's. I am pleased to update that information by noting that the minitrial was held last week, and on Saturday evening, May 21, it was successfully concluded. I believe this is the first time this ADR procedure has been used in a Superfund situation, and it worked.

I also noted that for our water resources projects which utilize the new cost-sharing formula, Public Law 99-88 and the Water Resources Development Act of 1986, we have included in our agreements with the non-Federal entities a provision which calls for ADR prior to any party to the agreement bringing suit in court. This provision has been uniformly supported by our project sponsors.

We in the Corps of Engineers believe that if ADR is to be adopted by Federal agencies, mindsets pertaining to methods of negotiation and litigation must change. The Corps has found that mindsets can be changed and that skillfully developed training is crucial to this change. The key is to reach a broad cross-section of the organization, and this cannot be done instantaneously. Rather, it is an ongoing process. Therefore, the Corps has developed ADR training programs, which have become part of mainstream legal, engineer and manager training.

For the last 5 years, we have developed and run sessions of a 5-day conflict management training course for middle- and senior-level employees. The course, which utilizes nationally known experts, covers ADR philosophies, techniques and application. It is built on a learn-by-doing model.

Currently, the Corps is developing a special executive training course for our Corps executives to complement the 5-day conflict management training.

In addition, ADR audiovisuals and self-learning training practices are also planned. The Corps objective is to put in place executive and mid-level management training in dispute resolution that will be available to all managers.

Clearly, the Corps record has established that ADR can be used to resolve disputes arising in Government. Some of the more significant lessons learned from these experiences indicate that ADR can bring the resolution of issues closer to factual reality because ADR encourages those closest and most knowledgeable in the technical aspects to work out agreements directly. Moreover, ADR permits the decisionmakers to make the decisions, rather than have them made by third parties.

ADR can decrease the load on the litigation system by ensuring that only major, precedent-setting claims go the full litigation route.

Lastly, ADR can reestablish trust between Government and industry. ADR techniques encourage parties to work collaboratively and jointly on solutions.

Now, obviously, I bring certain biases to bear in favor of alternate dispute resolutions. I am biased in support of ADR methods, including minitrials, in lieu of litigation where appropriate. I am biased in support of decisionmakers being urged, if not required, to make the decisions they are paid to make instead of passing them on to third parties, whether the third party by a judge, a lawyer, a disinterested third party or so-called "neutral expert." I am biased in support of interest-based bargaining in lieu of traditional positional bargaining.

I believe to the greatest extent possible that when the parties leave the negotiating table, whether there be two or ten parties of interest, the result should be a win-win situation rather than a win-lose situation. Rarely if ever should there be a lose-lose situation. The latter two types of situations do not last, as they only result in renewed or continued confrontation.

The Federal Government is rapidly recognizing the need to use more innovative approaches in resolving disputes. Relying exclusively upon traditional negotiations and the judicial process is not working on today's litigious environment. ADR methods, such as collaborative problem-solving, interest-based negotiations, minitrials, dispute review panels, and nonbinding arbitration hold promise for the development of a system which can resolve disputes quickly and efficiently.

Already the Corps and several other Government agencies have used some of these ADR methods successfully. And if we are really serious about making a dent in litigation now and in the future, ADR is available. With ADR, the future is now.

Thank you, Senator.

[Statement of Mr. Edelman follows:]

STATEMENT OF LESTER EDELMAN
CHIEF COUNSEL, UNITED STATES ARMY CORPS OF ENGINEERS
BEFORE THE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE, UNITED STATES SENATE

May 25, 1988

Mr. Chairman and members of the subcommittee:

I am Lester Edelman, Chief Counsel of the United States Army Corps of Engineers. With me are Frank Carr, Chief Trial Attorney for the Corps of Engineers and Dr. Jerome Delli Priscoli, a Senior Policy Analyst, from the Corps of Engineers Institute for Water Resources.

I appreciate this opportunity to appear before you to testify on alternative disputes resolution, or ADR as it has come to be known. The Administration is continuing its review of S. 2274, the Administrative Dispute Resolution Act of 1988. Accordingly, I will not be speaking on the substantive provisions of S. 2274 at this time. However, I want to share with you why and how the Corps of Engineers uses ADR.

The members of this subcommittee deserve a great deal of praise for considering ADR as an effective alternative to the costs, delays and disruptions of litigation. Your interest in ADR will do much to support the use of ADR by Federal agencies and to put a stamp of approval on this concept. Merely by holding this hearing and even without legislation, you will help spread the word to other Federal agencies that ADR programs are acceptable.

I commend those organizations who have helped us with their encouragement and support when the Corps of Engineers established the first ADR program within the Government. The Center for Public Resources ("CPR"), a nationwide coalition of business, industry, Government and academia, was the among the first to recognize the Corps of Engineers' achievements in ADR. In 1985, we were recognized by CPR for excellence and innovation in ADR. The Corps received CPR's Outstanding Practical Achievement Award for implementing a comprehensive mini-trial program to resolve construction contract disputes.

The Administrative Conference of the United States has also been very supportive. Through its leadership and publication of ADR articles, the Administrative Conference has let other Federal agencies know that ADR is a viable alternative to litigation. We appreciate that the Administrative Conference has helped us share our experiences in ADR with other agencies.

Although the Corps of Engineers has explored the use of ADR in many areas, our initial use and certainly our most comprehensive experience has been in the area of contract disputes. Accordingly, I will address our experience in this area of disputes resolution.

The use of alternative methods for resolving contract disputes is a recent development in the Federal Government. Traditionally, Government agencies, including the Corps, have relied almost exclusively on negotiations by attorneys or litigation at boards of contract appeals before administrative judges to resolve contract disputes. In the past few years, however, this has begun to change in the direction toward alternative disputes resolution.

REASONS FOR ADR

Three primary reasons made the Corps decide to consider ADR methods for resolving its contract disputes with its construction contractors. These reasons were: (1) the costs of litigation, (2) delays in obtaining decisions from contract appeals boards; and, (3) the disruptions to Corps' management in defending protracted litigation.

Although the direct costs of litigation are more readily apparent to the Corps' contractors, the Government does incur considerable costs associated with contract litigation. Since almost every contractor is now represented by an attorney, the most obvious costs to them are attorney fees. Considering that discovery practice before boards of contract appeals is as extensive as before the courts, attorney fees for contractors can be substantial. For the Government, attorney costs are not as apparent, but the increasing number of attorney hours devoted to more numerous and more complex contract appeals has had a noticeable impact on personnel allocations and costs within agencies. Additionally, both parties incur common expenses for discovery, fees for expert witnesses, and sometimes, computerized litigation support services. All of these costs make litigation extremely expensive, and in some cases, reduce the recovery, if any, by a sizeable amount.

Delays in getting a decision from a board of contract appeals are now well known. In appeals not heard under the board's accelerated procedures for claims under $50,0000, the time between filing an appeal and receiving a decision can run from two to four years. The most recent Armed Services Board of Contract Appeals ("ASBCA") report reflects that for all cases, including accelerated hearings, the average time on the ASBCA docket is well over one year (440 days). Considering that cases handled under the Board's accelerated procedures are included, this statistic is not encouraging.

The causes for such delays are a concern of all parties practicing before the contract appeals boards. Since the enactment of the Contract Disputes Act of 1978, caseloads at the boards of contract appeals have risen dramatically while the number of administrative judges handling them has remained about the same. At the ASBCA alone, the number of docketed appeals has increased 200% between 1978 and 1987. Likewise, the Corps of Engineers Board of Contract Appeals has experienced an increasing number of appeals on its docket. In the last five years, the Engineer Board docket has grown from nearly 200 cases in 1982 to over 300 in 1988. These figures result from continual yearly increases in the number of contract appeals filed at the boards of contract appeals.

A final significant concern that confronts both the Government and the contractor is the disruption to management during litigation. Litigation requires not only an attorney's time and efforts, but the dedication of many other personnel resources. Certainly, anyone directly connected with the factual basis for the claim can be involved for substantial amounts of time during discovery and at the hearing. Also, in complex cases, litigation support teams are often formed. Such teams, consisting of technical experts, auditors, and managers, consume many additional man hours and divert valuable manpower resources from current projects.

Undoubtedly, there are many other adverse impacts of litigation besides the three reasons discussed above. Perhaps the least obvious of these other impacts is that lengthy litigation can cause economic hardships and destroy otherwise good business relationships. These results are not desired by either party when initiating litigation.

Considering the costs of litigating a claim, the delays in obtaining decisions, the disruption to management, and the other adverse impacts of litigation, the present system is unsatisfactory to many litigants. These reasons caused the Corps and its contractors to consider ADR.

THE CORPS' USE OF ADR IN CONTRACTS

In an effort to avoid the problems discussed above and to provide a less costly and more expeditious alternative to contract litigation, the Corps of Engineers explored the use of ADR. Currently, three ADR methods have been implemented: the mini-trial, a disputes resolution panels, and nonbinding arbitration.

Before I discuss our experiences with each of these methods, I want to make some preliminary statements about these ADR methods. First, everyone needs to recognize that none of these methods is a replacement for traditional negotiations conducted by attorneys representing the parties. Clearly, negotiation is the method by which most contract appeals are settled at this time and will probably continue to be the method of choice in the future. However, negotiation alone has not been able to stem the tide of rising caseloads at the boards of contract appeals. In addition, too many appeals are settled by negotiations on the courthouse steps only after time consuming and costly discovery has been completed. Obviously, other methods are needed to supplement traditional negotiation as an alternative to litigation. ADR meets this need.

Of the three ADR methods now being used, the mini-trial is being employed the most frequently. The mini-trial was originally developed in 1977 to resolve a patent infringement suit. Several years later, in 1982, NASA became the first

Government agency to use a mini-trial to settle a dispute in a contract case. However, the mini-trial was not fully implemented in Government contracting until the Corps of Engineers began a mini-trial pilot program in 1984. We used the mini-trial to quickly resolve a number of complex contract disputes. We also published an Engineer Circular, No. 27-1-3, dated September 23, 1985, outlining mini-trial procedures.

The disputes resolution panel is another ADR method that is being used by the Corps of Engineers to resolve contract disputes. So far, we have included a provision in two contracts advising the contractor of the availability of this ADR method. However, a panel has not yet been used.

A third ADR method available is nonbinding arbitration. The Corps of Engineers has used this ADR method with satisfactory results.

Each of these ADR methods, although similar in purpose, uses different procedures. The selection of a particular ADR method will depend upon the needs of the parties and the nature of the dispute. In my opinion, no single ADR method is a panacea that can be used by every Government agency to resolve all contract disputes. Furthermore, not every dispute can be resolved--some cases must be litigated.

Mini-Trial

The first ADR method developed to resolve disputes in Government contracting was the mini-trial. Although the term mini-trial was coined, the label really is a misnomer. The mini-trial is not an adversarial judicial proceeding. Rather, the mini-trial is a structured negotiating process that uses a blend of traditional negotiations, mediation, and arbitration.

We defined the mini-trial as "a voluntary, expedited, and nonjudicial procedure whereby top management officials for each party meet to resolve disputes." The essential terms used in this definition are:

Voluntary. The agreement to conduct a mini-trial is totally voluntary. There is no statutory, regulatory or contractual requirement that the parties engage in a mini-trial. Further, in keeping with its voluntary nature, a party may withdraw at any time from a mini-trial without prejudicing its position in litigation.

Expedited. The time for conducting a mini-trial is substantially compressed. A mini-trial takes a few months to complete instead of the years involved for litigation.

Nonjudicial. The process is not directed toward a trial. A mini-trial culminates in a fact finding presentation which is not bound by the formality and inflexibility of a judicial proceeding.

Management Officials. The process uses management officials rather than third parties such as attorneys or judges to resolve the disputes. Management officials actually are drawn back into the decision making process on contract claims.

Looking beyond the definition, the general characteristics of a mini-trial are easy to understand. They expand on the basic definition and may be organized into five distinct elements. These characteristics include: involving top management; limiting the time of the mini-trial; conducting an informal meeting; holding nonbinding discussions; and considering guidance from a neutral advisor. Each of these elements may be tailored to achieve the best fit of the mini-trial to the dispute at issue.

The involvement of top management in the mini-trial is essential to the success of the process. Having top management decide the dispute enables the parties to use management skills and policies to resolve a dispute.

Ideally, the management official should not have been personally involved in the dispute. For the Government, this means selecting a management official from an organizational level above the contracting officer when the dispute is on appeal before a board of contract appeals. Participation of this level of management ensures that the official's deliberations and judgments are not clouded by any previous involvement in the dispute. This affords each party an opportunity to take a fresh look at the dispute. Moreover, prior to issuing a contracting officer's final decision, the mini-trial could be utilized by the contracting officer for the same reasons.

At the mini-trial's informal meeting, the management official acts as the "principal" representative for the party. In order to expedite the process, the principals should have full authority to settle the dispute. The principals need the ability to bind the parties without incurring additional delays which would result from the need to refer the dispute to other parties in the organization for decision. Consequently, the principal for the Government must have contracting officer authority. This can be accomplished by qualifying the principal as a contracting officer and making the principal a successor contracting officer for purposes of the mini-trial.

The principal also should have general technical expertise to understand the basic problems underlying the dispute. This is necessary because the process does not allow sufficient time to educate a principal in the technical areas necessary to resolve the dispute.

The mini-trial's duration is short. In most cases, the process should be completed within one to three months, including the time for discovery and the informal hearing. Expressly limiting the scope of the discovery and the informal hearing is required in order to complete the process in a short time. Otherwise, the mini-trial could evolve into a process as time consuming as existing litigation procedures. In order to maintain the short time period for the mini-trial, the parties need to agree to a schedule at the beginning. A fixed schedule commits the parties to an expedited process.

To meet the expedited requirements of the mini-trial, the parties should agree to limit depositions, interrogatories and other discovery devices. Any problem encountered during discovery normally can be handled by the parties themselves without the judicial intervention commonly found in litigation. As a last resort, the parties may agree to have the neutral advisor resolve any discovery problems.

As far as a principal's time is concerned, it is considerably less than the three month period necessary to complete the mini-trial process. Normally, prior to the hearing, each party has an attorney brief its principals on the issues. Thus, the principal's time is limited to the hearing which typically lasts for only one to two days followed by settlement discussions.

The actual hearing is informal. The length of time allowed for the presentation of the case and rebuttal is scheduled in advance and strictly adhered to during the hearing. In keeping with the informal nature of the proceeding, no transcript of the hearing is produced and the rules of evidence and procedure are not enforced.

The informal hearing is not adversarial since the purpose of the hearing is to quickly inform the principals of the facts underlying the dispute. The attorneys are allowed considerable flexibility in the manner in which they present their case. Witnesses, experts, documents, oral argument, graphs and charts may all be used to quickly inform the principals about the dispute. No objections are allowed. Furthermore, witnesses are allowed to testify in a narrative form.

The informal hearing does provide an opportunity for the principals and the opposing attorney to question the witnesses. The principals should be able to ask questions at any time to clarify the testimony of a witness. Obviously, however, a principal should not assume an adversarial role. As far as opposing counsel is concerned, there is an opportunity at the close of the other party's presentation to question the witnesses. However, this time is strictly limited.

In keeping with the voluntary and cooperative nature of the mini-trial, the contents of the informal hearing are kept confidential. Neither party may use the testimony presented at the hearing in subsequent litigation as evidence of an admission by the opposition.

At the conclusion of the hearing, the principals meet privately to discuss the dispute. During the meeting, the principals may take breaks and consult individually with their staffs including legal counsel. However, the staffs should not be present during discussions. The discussions should be guided only by the principals unless the principals agree to have the neutral advisor present. These discussions are nonbinding. Although the principals should have full authority to settle the dispute, the parties are not required to reach agreement.

The last characteristic of the mini-trial is the use of a neutral advisor to assist the principals in assessing the merits of the claim. The use of the neutral advisor is optional, but if the parties decide to use a neutral advisor, they need to clearly define the neutral advisor's role. Prior to the informal hearing, the neutral advisor can assist in establishing the hearing schedule and help in controlling the discovery process. At the informal hearing, the neutral advisor may participate actively by questioning witnesses, or may participate passively by merely furnishing advice to the principals. When the hearing is concluded and the principals meet privately, the neutral advisor may be invited to join them to facilitate the discussions and to give opinions.

The principals need to remember, however, that the neutral advisor's opinion is only advisory. Later, the principals may want the neutral advisor to furnish a written opinion. If the mini-trial does not resolve the claim, the parties also should treat the neutral advisor's opinions as confidential and the neutral advisor should be prohibited from subsequently acting as a consultant or witness in litigation on the claim.

Obviously, the selection of an appropriate neutral advisor is critical. The neutral advisor should have experience in Government contracting. This will save time by eliminating the need to educate the neutral advisor on the underlying and sometimes confusing Government contract procedures, and it will allow more time to concentrate on the technical details of the case. Also, litigation experience is helpful since the principals may want an assessment of the strengths and weaknesses of their case.

After deciding to conduct a mini-trial, the parties should prepare a written agreement. The mini-trial agreement is used to assure that the process is conducted without additional procedural disputes. The mini-trial agreement should be used to establish both the discovery and hearing procedures.

The mini-trial agreement should set strict time limits for each event. This means setting precise times for discovery, the hearing, and the discussions between the principals. By memorializing time schedules in the mini-trial agreement, the parties are committed to conducting the mini-trial in a timely fashion. The use of an agreement discourages the tendency to postpone events necessary for completion of the process.

To prevent additional disputes concerning events leading up to the mini-trial hearing, the mini-trial agreement should restrict the scope of discovery in the agreement. For example, the parties may limit the number of depositions and the amount of time for taking them, and may specify the number of interrogatories which each party may submit. A completion date for discovery should be stated.

At the conclusion of discovery, the mini-trial agreement may allow the attorneys to furnish position papers to the principals. This permits the principals to become familiar with the general nature of the dispute prior to the hearing. The agreement may specify the length and format of the position papers. The parties should also agree to exchange witness lists and exhibits, as well as to finalize any stipulations needed for the hearing.

For the hearing, the mini-trial agreement needs to state the exact time of each presentation and the order of presentation. The parties must strictly adhere to the time limits for the process to succeed. Closing statements, if any, should also be scheduled.

Two final points should be clarified in the mini-trial agreement. First, at any time during the process, either party can decide to terminate the mini-trial. A party may withdraw for any reason whatsoever. No cause for termination is required. From the time an offer of a mini-trial is extended to the contractor until the conclusion of the final discussions between the principals, either party may refuse to continue with the process. This is consistent with the voluntary nature of the process. Second, evidence presented at the mini-trial should remain confidential and should not be used in subsequent litigation, unless the parties have agreed otherwise. Mini-trials, therefore, expose each party to minimal risk since the discussions are confidential and either party may withdraw at any time. Both points need to be covered in the agreement.

Clearly, the mini-trial agreement signed by both the principals and their attorneys forms the foundation of a successful mini-trial. As I stated before, the agreement is a commitment by the parties to participate and cooperate in an expedited process.

When selecting a case for mini-trial, the nature of the dispute and the amount of the claim must be considered. Cases solely involving questions of law are not normally appropriate for a mini-trial because the principals resolving the dispute will not be qualified to evaluate complex legal questions. Further, claims involving small sums of money are not good cases since they can be processed under the accelerated procedures of the boards of contract appeals. Appropriate cases for a mini-trial should have clear legal precedent so that resolution of factual issues will determine the outcome of the dispute.

Once the parties agree to conduct a mini-trial, they need to consider what action to take on the pending appeal. Since the mini-trial is a nonjudicial proceeding, the adjudication of the appeal will continue unless the parties suspend the litigation. The parties should, therefore, file a motion with the board of contract appeals to suspend the board proceedings. The mini-trial agreement may expressly provide for the joint filing of such a motion.

The Corps of Engineers is the leader in the Federal Government in using the mini-trial to resolve contract disputes.

The Corps conducted two successful mini-trials prior to the implementation of our regulation in 1985. Since that time, we have conducted many other successful mini-trials. Because our first two mini-trials paved the way for the use of ADR in the resolution of contractual disputes, I will discuss them in some detail.

The Corps of Engineers' first mini-trial was conducted in 1984 to settle a contract dispute with Industrial Contractors, Inc., ("ICI"). The principals resolved an acceleration claim in the amount of $630,570 in less than three days by settling the dispute for $380,000. At the mini-trial, we were represented by our South Atlantic Division Engineer, while ICI was represented by its president. The neutral advisor was Judge Louis Spector, who has since retired from the U.S. Claims Court.

The comments of the participants after the conclusion of the mini-trial were significant. The parties agreed that by using the mini-trial, they were able to present the same amount of evidence in two days that would have taken them weeks at a board hearing. Further, the principals received a much clearer appreciation for the opposing party's position and its supporting evidence.

Our second mini-trial involved an appeal pending at the Engineer Board. The dispute arose under a contract for the construction of the Tennessee Tombigbee Waterway. The contractor, Tenn-Tom Constructors, Inc., was a joint venture composed of Morrison-Knudsen, Brown & Root, and Martin K. Eby, Inc. The $55.6 million (including interest) claim was settled for $17.2 million. A vice president for Morrison-Knudsen acted as principal for the joint venture and the Corps' Ohio River Division Engineer represented the Government. Professor Ralph Nash of the George Washington University School of Law was the neutral advisor. Following a three day mini-trial on June 12-14, 1985 and a one day follow-up mini-trial on June 27, 1985, the principals agreed to settle the claim.

This mini-trial effectively demonstrated the flexibility of the mini-trial process. Although the attorneys had completed their planned presentations on June 14, the principals decided that they needed additional facts in order to discuss settlement. At the joint request of the principals, the attorneys had to make a further presentation two weeks later on the additional facts. After the principals received this information, they were able to settle the dispute. Obviously, the principals had taken command of the mini-trial.

Another significant development of the Tenn-Tom mini-trial was that the Department of Defense Inspector General (IG) investigated the settlement. The investigation was initiated because of a "hotline" inquiry about the appropriateness of the settlement procedures. After conducting an extensive review of the documents and interviews with personnel involved with the case, the IG made a formal report. The IG found that the settlement was in the best interest of the Government, and concluded that the mini-trial, in certain cases, is an efficient and cost-effective means for settling contract disputes. This conclusion provides a strong validation of the mini-trial as an ADR method for resolving Government contract disputes.

The Corps of Engineers has had more mini-trials since these two early ones. The most recent report of the Administrative Conference on the use of ADR to resolve contract disputes describes the results of these mini-trials in detail. Additionally, several articles have been written and published by participants in the Corps' various mini-trials. These articles discuss the flexibility of the mini-trial method, and highlight the experiences of the participants. During the past year, the Corps of Engineers has not been alone in conducting mini-trials. The Department of the Navy is to be commended for its successful mini-trials. The Navy has conducted several mini-trials under its ADR program. These mini-trials were initiated with mini-trial agreements similar to ours.

The types of issues considered by the principals in the Navy mini-trials, however, were different. Unlike the Corps of Engineers mini-trials, which considered only factual issues, the Navy in three of its mini-trials considered questions of both fact and law to resolve cost accounting issues. To assist the principals on the legal issues, the Navy had separate legal counsel present with the principals.

Three of the Navy mini-trials resulted in a settlement. In another mini-trial, although the dispute was not settled, the Navy was successful to the extent that the parties narrowed the issues in the dispute.

Clearly, the record has established that the mini-trial is an ADR method that can be used to resolve disputes arising in Government contracts. The mini-trial provides the opportunity to resolve the dispute without the costs, delays, and disruptions of litigation. Even if the dispute is not resolved, the mini-trial still provides clear benefits to the parties. At the very least, the mini-trial process forces the parties to quickly narrow the issues underlying the dispute and to develop all relevant facts that support the parties' positions.

Disputes Resolution Panel

The Corps of Engineers has just recently begun to use a new ADR method that we refer to as a "dispute resolution panel." Although this method is new to the Federal Government, it has been used by several state governments in large construction projects performed in the western states. Under this ADR method, the parties agree that contract disputes arising during construction may be voluntarily submitted to an independent panel of experts for an opinion as soon as disputes occur.

For our contracts, a disputes resolution panel will consist of three private technical experts. The Corps and the contractor each select one member of the panel and the third is selected by agreement of the two members. The procedure provides for disputes to be submitted quickly to the panel and for them to make a nonbinding written recommendation to the contracting officer and the contractor.

The disputes resolution panel differs from the mini-trial in several respects. The first of these is timing. The panel operates during the construction period when disputes first arise and the panel's recommendations are received prior to the issuance of the contracting officer's final decision. Second, the panel is composed of technical, not legal, experts. Accordingly, the best use for the panel is the resolution of highly technical questions of fact. Third, since the panel is available during contract performance, it should have a preventive effect.

Unlike most ADR methods which seem to handle disputes at the appeal stage, the panel attempts to resolve a dispute at its inception, before the Government and the contractor have begun to expend resources in support of the litigation. Further, easy accessibility to the panel and the prompt resolution of disputes should cause a minimum of disruption and enhance the working relationship between the parties.

At this time, two Corps of Engineers Districts are in the process of implementing this ADR method. These two Districts have used a disputes resolution panel provision in their contracts. So far, however, the panel has not been convened.

Nonbinding Arbitration

Arbitration has been defined as a "consensual means for the settlement of disputes and controversies by reference to a private party or parties instead of a judicial tribunal." This voluntary ADR method has been used extensively to resolve disputes between parties. Typically, the parties submit the dispute to an arbitrator and agree to be bound by the decision.

The Federal Government has used binding arbitration in certain areas when expressly authorized by statute. According to the Comptroller General of the United States, such statutory authority is required for the use of arbitration to bind the Government. Since there is no specific statute which authorizes binding arbitration for contract claims, the Comptroller General has stated that a contracting officer may not submit a contractual dispute to binding arbitration.

Although binding arbitration is not available for our use, nonbinding arbitration is a viable alternative. Recently, in an appeal pending before the Engineer Board, the Corps and the contractor agreed to submit the dispute to a private arbitrator for a nonbinding report. Since the dispute was highly technical, the parties decided to select an arbitrator with technical expertise rather than a legal background.

The interesting aspects of this nonbinding arbitration were that the procedure was in many ways very similar to the mini-trial procedure and that the contracting officer participated in the process. The parties agreed to a procedure involving a two step process. At the first step, each party made an informal presentation of the facts and its position to the private arbitrator. Based on this presentation and the documents furnished the arbitrator, the arbitrator prepared a written report. For the second step, the arbitrator met with the principals who had full settlement authority. The arbitrator was required to make an oral presentation of the findings and recommendations in the report. After hearing the arbitrator's presentation and reviewing the report, the principals began settlement discussion. The case settled the same day in accordance with the arbitrator's recommendation.

Following the successful use of nonbinding arbitration in this appeal, we used the process in two other appeals. In one of these appeals the dispute was submitted to a panel, rather than a single arbitrator, for a report. Both cases were settled for the amounts recommended in the reports.

Although nonbinding arbitration was successful in these cases, the obvious disadvantage of nonbinding arbitration is that the parties are not bound by the decision of the arbitrator. However, if the parties are careful in the selection of the arbitrator and the arbitrator has credibility with both parties, the recommendation of the arbitrator will be accorded considerable weight. I would also note, that while there may be real benefits to binding arbitration under certain circumstances, it shares many of the same disadvantages as trials brought before administrative boards of contract appeals and courts. Moreover, it tends to once again turn decision-making over to third parties rather than retaining it in the real parties of interest.

Regarding the future of binding arbitration, we are aware that the Administrative Conference has recommended its use "as a means of resolving some controversies." Although the view in the Federal Government is generally mixed as to the value of binding arbitration, the Corps of Engineers would welcome the opportunity to use binding arbitration as an additional voluntary method of resolving construction contract disputes on a trial basis. Accordingly we have advised the Administrative Conference that the Corps of Engineers is willing to conduct a limited three year pilot program for the Federal Government if appropriate legislation is enacted, and to monitor and report the results of such a program.

ADR IN OTHER AREAS

The Corps of Engineers is looking beyond its successful application of ADR in construction disputes. In my view, many of the environmental and cooperative efforts that involve the Corps, public interest groups, local governments and other Federal agencies could benefit from the use of ADR techniques in appropriate situations. The Corps has begun to apply traditional ADR methods to non-traditional areas such as

Superfund and cost sharing of projects. I will share with you a few illustrations of how the process has worked for us.

Environmental Disputes

What we now refer to as ADR is not new to the Corps of Engineers. Before the Corps' development of a comprehensive ADR program for contract disputes, an innovative Corps' District Engineer successfully used an ADR technique to avoid litigation over environmental issues in a situation involving the issuance of a Corps' permit at Sanibel Island in Florida.

In 1979, a developer applied for a Corps of Engineers permit under Section 404 of the Clean Water Act, which authorizes the discharge of dredge or fill material into the navigable waters of the United States. The District Engineer of the Jacksonville District brought together all of the parties who usually are in conflict over the Corps' permit program. Included in the process were local business development interests, environmental groups, the mayor, and various other special interest groups and associations. Development of a general permit was presented to the parties concerned as the best tool for balancing long-term planning and conservation needs. The District Engineer indicated that if the people at the table could agree on technical specifications and parameters, the Corps would incorporate that information into the terms of the general permit. In essence, the price for this permit, consensus among the parties, was more than offset by the commonly desired goal of long-term certainty for developers, environmentalists, and local citizens regarding the scope of proposed development in the area.

More recently, the same procedures were successfully employed in the reissuance of a general permit for hydrocarbon exploration and production by our Vicksburg District. Like the Jacksonville case, the involvement of many parties was seen as necessary to the decision making process. Consequently, the Vicksburg District Regulatory Branch solicited and received commitments from Federal and state agencies to participate in a consensus building process designed to gather information and develop a general permit agreeable to all parties. Also, invitations to participate were given to both the industry and the environmental community.

The industry and environmental community participants met separately and elected representatives to serve their interests at a series of meetings with Federal and state agencies. These meetings were designed to provide information leading to a decision on reissuance of the general permit. Industry elected representatives familiar with each of the major oil and gas fields within the Vicksburg District. Environmental representatives elected were from the Audubon Society and the Sierra Club. The Vicksburg District's participation in this process was limited to advising the participants on technical matters and to facilitating the discussions. The outcome of this process was a consensus decision on the wording and conditions of the permit. To date, there have been no disputes concerning either the Jacksonville or Vicksburg permits.

The ADR frameworks used by the Jacksonville and Vicksburg District were uniquely molded by the Corps in an effort to design the most effective mechanism possible, given that particular set of circumstances. In a sense, each controversy is unique and requires a measure of flexibility to adequately handle the differences in issues and parties. Nonetheless, my experience with ADR indicates that if certain basic elements, such as representatives with authority to make binding decisions and flexibility are present, the ADR will function successfully.

Superfund

The passage of the Superfund Amendments and Reauthorization Act in 1986 statutorily enacted a Defense Environmental Restoration Program targeted at the cleanup of existing and formerly used DOD installations. The Corps of Engineers serves as the executive agent for DOD in addressing environmental remediation of formerly used sites. In many instances, decades have intervened between DOD ownership and the identification of contamination on the site. This only serves to complicate our efforts to determine the extent of DOD responsibility for site remediation. Of further significance is the involvement of many owners who may have engaged in different contaminating activities subsequent to DOD ownership of the property. All this, as well as the necessity to deal with enforcement personnel at both state and Federal levels adds to the complexity of avoiding litigation in such matters. In this Superfund related environmental restoration program, the Corps is using ADR processes in an attempt to resolve disputes related to the extent of DOD responsibility for site contamination.

There is presently underway a mini-trial between the Corps and Goodyear Tire and Rubber Company involving the resolution of responsibility for contamination at a site formerly used by the Navy during the early 1950's. Both Goodyear and DOD have been named as potentially responsible parties by EPA pursuant to Superfund. Previous use of traditional negotiations with Goodyear were not successful in reaching a basis on which the parties could affix their respective responsibility percentages. The parties, looking to avoid the expense and delay associated with litigating this complex matter, have agreed to use a mini-trial to determine the allocation of responsibility for the remedial effort at the site.

The parties reached agreement on this ADR process on March 11, 1988. The schedule contained in this agreement provides for an expedited discovery process culminating in a three day hearing May 18-20, 1988. The decision-makers for the parties are the Corps' Omaha District Engineer and a vice president of Goodyear. The parties selected Professor Richard C. Collins, from the University of Virginia's School of Architecture, Division of Urban and Environmental Planning to assist them as a neutral observer during the mini-trial process. We eagerly look forward to the results of this use of ADR in the Superfund program.

Water Resources Planning: Cost Sharing

The 1985 Supplemental Appropriations Act (P.L. 99-88), provided funds for the Corps of Engineers to go forward with forty-one new water projects. None of the funds could be expended on a given project unless the non-Federal project sponsor entered into cost sharing agreements with the Secretary of the Army by June 30, 1986. By allowing water projects to move forward under new cost-sharing formulas, P.L. 99-88 signalled a new beginning for water resources development. If agreements could be reached with non-Federal project sponsors, the efficacy of the new cost-sharing principles would be demonstrated, and permanent legislation making cost-sharing applicable to all new projects could be enacted.

The Corps successfully concluded cost-sharing agreements by June 30 in all but one instance. Less than five months later, Congress enacted into law the Water Resources Development Act of 1986 (P.L. 99-662). The Act requires that construction of new civil works projects be done in cooperation with a non-Federal sponsor responsible for a percentage of the project's cost. The cost to the project sponsor generally includes the provision of all real estate interests needed for the project; other non-Federal obligations include operating and maintaining the project after completion (except for commercial navigation projects) and agreeing to indemnify the Corps for damage claims not resulting from the negligence of the Corps or its contractors.

Mandatory cost-sharing, and the attendant sharing of risk and responsibility, is the new reality for the Corps and our non-Federal sponsors. Legally required cooperation, however, is not necessarily free from dispute. In fact, because both parties to cost sharing agreements usually are sovereign entities dominant in their own spheres, the potential for serious disagreement seems great. Issues concerning project modifications, construction schedules, valuation of real estate interests, or even the choice of accounting methodologies will arise in almost all cost shared projects. How those issues ultimately get resolved will, in large part, determine whether cost sharing succeeds or fails.

Because ongoing cooperation is essential in the construction and operation of major water projects, and because cost-sharing in general will continue to be scrutinized closely by Congress and interest groups, some type of dispute-resolution mechanism needs to be available to address the issues certain to arise under cost-sharing agreements. The cost, divisiveness and negative publicity associated with litigation clearly are incompatible with the goals of cost-sharing; thus, the Corps cannot afford to have disputes settled in traditional judicial forums. ADR, on the other hand, seems especially compatible with the principles underlying cost-sharing and cooperative agreements between public entities.

To ensure that ADR methods are applied to disputes arising under project cost-sharing agreements, the Corps proposed that the following provision be included in each agreement negotiated pursuant to P.L. 99-88:

> Before any party to this Agreement may bring suit in any court concerning an issue relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation or other forms of non-binding alternative dispute resolution mutually acceptable to the parties.

Project sponsors uniformly accepted the ADR provision; all of the agreements reached under P.L. 99-88 contain it. Moreover, project sponsors seemed pleased that ADR is required before suit may be brought under the agreements. A few, in fact, asked that the word "non-binding" be eliminated from the provision, in effect inviting the prospect of binding arbitration. Because the Federal Government is not authorized to enter into agreements for binding arbitration, the proposed change was not adopted. Nevertheless, project sponsors agreed that any form of ADR was preferable to traditional litigation.

The ADR provision of the Corps' agreements is deliberately general: it does not specify a particular form of ADR, but merely requires an attempt to use some form of ADR before resorting to the court system. We considered specifying various ADR options, such as proceedings before the Engineer Board of Contract Appeals or mini-trials before a neutral party mutually selected by the Corps and the project sponsor, but in the end recognized that the unlimited number of types of disputes that could arise precluded the prior selection of a particular form of ADR mechanism. By permitting the parties to choose an ADR forum after learning what type of dispute exists, the ADR provision seeks to preserve the availability of the "best" mechanism for resolving a particular dispute, whatever that might be.

Because of the clear value of the ADR provision and its ready acceptance by project sponsors, the we plan to include this provision in every local cooperation agreement executed by the Corps and the non-Federal project sponsor. Although the Corps anticipates that most disputes can be avoided by open communication between the parties, the presence of the ADR option means that the mere existence of a dispute will not automatically lead to the disabling impact of a lawsuit.

CURRENT ADR PROGRAMS IN THE CORPS

Training

We believe that if ADR is to be adopted by Federal agencies, mind-sets pertaining to methods of negotiations and litigation must change. The Corps has found that mind-sets can be changed and that skillfully developed training is crucial to this change. The key is to reach a broad cross-section of the organization. This can not be done instantaneously. Rather, it is an ongoing process. Therefore, the Corps has developed ADR training programs which have become part of mainstream Engineer and Manager training.

For the last five years, we have developed and run sessions of a five day conflict management training course for middle and senior level employees. The course, which utilizes nationally known experts, covers ADR philosophy, techniques, and applications. It is built on a "learn by doing" model.

Currently, the Corps is developing a special executive training course for all Corps executives to compliment the five day conflict management training. In addition, ADR audio visuals and self-learning training packages, are also planned. The Corps objective is to put in place executive and mid-level management training in disputes resolution that will be available to all our managers.

Technical Assistance

Technical assistance is vital to encouraging the adoption of new ideas in any organization. Throughout the 1970's the Corps had an effective Technical Assistance program to support the use of new public participation technologies. The success of this program, which was used for organizing public interest discussions in controversial Corps' projects is undisputed. A similar program for ADR is now being developed. This program will provide the following support to Corps' field elements:

- Designing special on-site training, based on specific problems;
- Helping commanders prepare for negotiations by:
  Developing optional approaches to negotiations and bargaining; Identifying issues, interests, and positions of major interested parties.
- Assisting in the development and use of single text negotiations techniques including the drafting and revising texts;
- Applying principles of interest-based bargaining, conciliation, mediation, and third-party intervention to specific Corps' situations;
- Mediating disputes, in which the Corps is a party and those in which the Corps is a facilitator;
- Employing ADR techniques to internal Corps conflict situations where appropriate, and;
- Assisting field offices in locating and employing credible third parties where needed.

Evaluation

Monitoring current ADR programs is vital to determine what processes work for the Corps. Also, the cost and benefits of the use of ADR should be assessed. Therefore, documentation is an important part of the Corps' ADR program. Currently, we are attempting to identify the appropriate evaluation mechanisms for our program. Evaluation is an important concept. Our work is this area is just beginning.

CONCLUSION

Clearly, the Corps record has established that ADR can be used to resolve disputes arising in Government. Some of the more significant lessons learned from these experiences indicate that ADR can bring the resolution of issues closer to factual realities because ADR encourages those closest and most knowledgable in the technical aspects to work out agreements directly. Moreover, ADR permits the decision-makers to make the decisions, rather than have them made by third parties. ADR can decrease the load on the litigation system by insuring that only major precedent setting claims go the full litigation route. Lastly, ADR can reestablish trust between Government and industry. ADR techniques encourage parties to work collaboratively and jointly on solutions.

Obviously, I bring certain biases to bear in favor of alternative dispute resolution. I am biased in support of ADR methods, including mini-trials, in lieu of litigation where appropriate. I am biased in support of decision makers being urged, if not required, to make the decisions they are paid to make, instead of passing them on to third parties, whether the third party be a judge, a lawyer, a disinterested third party or a so called neutral expert. I am biased in support of interest based bargaining in lieu of positional bargaining. I believe to the greatest extent possible, that when the parties leave the negotiating table, whether there be two or ten parties of interest, the results should be a win-win situation rather than a win-lose situation. Rarely, if ever, should there be a lose-lose situation. The latter two types of situations do not last, as they only result in continued confrontation.

The Federal Government is rapidly recognizing the need to use more innovative approaches in resolving disputes. Relying exclusively upon traditional negotiations and the judicial process is not working in today's litigious environment.

ADR methods such as collaborative problem solving, interest based negotiations, mini-trial, disputes review panel, and nonbinding arbitration hold the promise for the development of a system which can resolve disputes quickly and efficiently. Already, the Corps and several Government agencies have used some of these ADR methods successfully.

In my judgment the future for ADR is now.

Senator **Heflin**. Professor Gellhorn.

STATEMENT OF PROFESSOR GELLHORN

Professor **Gellhorn**. Mr. Chairman, Senator Grassley, I am a member of the Council of the Administrative Conference of the United States, but I want to stress at the outset that I in no sense speak for the Conference today. The Chairman of the Conference has spoken, and I support everything that he has said.

I am here, I believe, representing the "antique" constituency, as it were, because almost 50 years ago, I directed a study of the functioning of administrative agencies that affect persons outside the Government. Even as long ago as 50 years, the Attorney General's Committee on Administrative Procedure, which was, I think, a more imposing committee than its title indicates, was unanimous in declaring that the informal process of administration was the life blood of administrative adjudication and was the substitute for, precursor of, and often the eliminator of the need for, more formal procedures. There was no dispute about that.

I believe that to be true in the private sector as well. Hundreds of thousands of cases are filed in court for litigation, but we know that a tiny, tiny fraction of that total actually ever comes to trial and involves judicial action. The contested matters are disposed of informally, without the necessity of the formal process which is available.

I stress this point because in discussion of the use of ADR in the Federal Government, I have been met time after time by administrators who refer to some formal requirement of hearing, some formal process, some utilization of particular personnel, and say, "We are barred from using any other procedure." In my belief, that is not true at all. Disagreement with the notion that formal process is the only really sound process is instinct in the measure that you are now considering. The bill under discussion today stresses the importance of a commonsense approach, not a ceremonial approach, to the administrative process.

If S. 2274 moves forward with the approval of your committee, I believe that much will be done to overcome obstructive, misguided attitudes on the part of well-intentioned administrators, not persons who have anything other than the interests of Government and the citizenry in their minds, but nevertheless are blocking progress.

I do have some suggestions, if I may be so bold as to offer them to you, and that is that you should fine-tooth-comb the measure to get rid of formal requirements. You have very wisely accepted the proposition that any dispute the parties agree should be submitted to some informal process, may be so submitted. I can't imagine an administrator who would agree to submit to an arbitrator the question of what is the meaning of the statute under which the agency is functioning. If facts are not in dispute, but the scope of the agency's legal authority to act is in controversy, I cannot imagine his saying, "Let's submit that to John Doe, in whom we have confidence." But I advise leaving flexibility in the statutory language, and you have done that in the present bill.

Suggestions of rigidity appear, however, in hints that person who are to serve as "neutrals" must have some special set of qualifications, must pass some test, as it were, of their fitness for human consumption. I believe that to be a mistake. If the parties—that is to say, the Government agency involved and the person who is related to the controversy—agree that they have confidence in John Doe, and they think that John Doe is capable of dealing with the matters that are in issue between them, I favor their using John Doe, instead of John Doe's first having to satisfy the board of neutral licensing, as it were, that he has professional qualifications. To be perfectly blunt about it, I doubt that there is a specific professional qualification for being a neutral resolver of controversy. Personal capability and character are probably not measurable by some standardized formula apart from awareness of the functioning of the person involved.

Now, the bill does create a roster of neutrals, and asks the Administrative Conference to establish standards for neutrals, maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals. I do believe somebody should pass on the probity and objectivity of persons who serve on a roster, but I do urge you very strongly in your further consideration of the measure to get rid so far as possible of the necessity to surmount hurdles in order to function as a neutral in resolving controversies between a governmental agency and persons outside the Government.

I thank you.

[Statement of Professor Gellhorn follows:]

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SCHOOL OF LAW 435 West 116th Street

May 25, 1988

STATEMENT BY WALTER GELLHORN CONCERNING

S. 2274, "ADMINISTRATIVE DISPUTE RESOLUTION

ACT OF 1988," 100TH CONGRESS, 2d SESSION (1988)

I strongly favor the bill's declared purpose Sec. 2 (6), to encourage use of common sense procedures in appropriate cases. From earliest days governmental responsibilities have been entrusted to the administrative process because of its supposed flexibility, its supposed capacity to adjust procedure to purpose, its supposed ability to avoid rigidity of method without sacrificing fundamental principles of fairness and efficiency. If ambiguity does exist concerning agency power to bring supposition into accord with reality, I applaud the present proposal to lay doubts to rest.

In recent decades formal requirements have too often been uncritically regarded as routine elements of administrative determinations. They should instead be perceived as ultimate safeguards that need be utilized only when controversies survive despite efforts to resolve them informally. Formality of procedure has, in short, sometimes been confusedly viewed as a necessity rather than as an opportunity, as a requirement rather than as an option, as an end rather than as a means to the end of terminating disagreements.

The language of the Administrative Procedure Act lends no support to this view. When adjudication is "required by statute to be determined on the record after opportunity for an agency hearing," the statute says (Sec. 554) that certain procedural formalities must be observed -- for example, the giving of notice, the provision of suitable occasion for factual and argumentative presentations, the utilization of a suitably qualified official hearer, and so on. All of these directions that decisions be based on notice and hearing come into play, however, only "to the extent that the parties are unable so to determine a controversy by consent . . ."

Plainly, this branch of the Administrative Procedure Act in no way forestalls the use of informal devices to eliminate the need for a formal adjudicatory process. If those who are embroiled in controversy choose not to seek a determination based "on the record after opportunity for an agency hearing," they need not do so. The parties are entitled to an opportunity, but they are not required to avail themselves of it -- and the statute explicitly recognizes that controverted matters may be disposed of by means other than a trial-type hearing.

Most statutes applicable to individual agencies are similarly receptive of the idea that many important and binding determinations can be made consensually, without procedural rigidities. Legislative prescriptions of a procedural nature are mainly designed to be fall-back positions, as it were, rather than a rigid first line of defense against error. This has been the case for generations, even in areas that have generated considerable heat, like labor relations[1] and securities regulation.[2] Nearly fifty years ago the Attorney General's Committee on Administrative Procedure, upon completing a comprehensive investigation of federal administrative proceedings involving private interests, concluded (in language oft-quoted in later decades) that "informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."[3] I heartily applaud S.2274 because it may cause this lifeblood to course more freely through a few seemingly clogged arteries.

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[1] During the first four (and probably the most difficult) years of its existence the National Labor Relations Board closed consideration of 12,227 cases involving allegations of unfair labor practices. Of this total some 5,200 were dismissed by the Board when its investigations showed a want of sufficient evidence, or were withdrawn (often at the Board's suggestion) by the persons who had originally filed the charges. Something over 6,000 additional cases were settled by agreement of

If the Committee will indulge me, I should like to touch quickly on some particular segments of S.2274.

Section 3(b)(c). I am dubious about requiring designation of a senior dispute resolution specialist and about prescribing training courses for a few agency employees. The possibilities of negotiation,

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employers and employees after the intervention of Board representatives. In only 908 cases of the 12,227 cases -- less than eight percent -- did the matter proceed to the issuance of a formal complaint preliminary to a hearing; and of this rather insignificant segment of the whole, still another 400 cases were determined by dismissal, withdrawal, or settlement prior to rendition of a decision after hearing. Atty. Gen.'s Comm. on Admin. Proc., Monograph No. 18, National Labor Relations Board, Sen. Doc. No. 10 (77th Cong., 1st Sess., 1941), Part 5 at pp. 6,8. In 1983 the NLRB reported receiving 40,634 charges that unfair labor practices had occurred. A third of these were dismissed after investigation showed them to be ill-founded. The persons filing seemingly sustainable charges withdrew them in another third of the total. Of those remaining and seemingly well-founded, most were settled or adjusted at an early stage. Only 5.3% of the total resulted in a formal complaint and steps toward a hearing -- and only 2% resulted in a Board order after hearing. 48th Ann. Rept., NLRB (1983), at 2, 5-12.

[2] During the first twenty-six years of Securities Act administration, 15,930 registration statements were filed. Of this number 13,871 became effective, 1,605 were withdrawn; in only 202 cases were stop orders issued; only one stop order was judicially reviewed on its merits, and it was affirmed. 26th Ann. Rept., SEC (1959), at 31.

[3] Final Report of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941), at 35.

mediation, and adjustment should be understood generally within an agency's operating staff, and not merely by a few. Creating a separate corps of dispute resolvers will, I believe, generate problems of routing, responsibility, and red tape. What is wanted is sensitivity throughout a staff, not only in a particularly identified segment. Steps toward settling disagreements should be taken at early stages and not as a sort of grand finale. I am not yet persuaded that "training" in the "theory and practice of negotiation, mediation, arbitration, or related techniques" will be as productive as, simply, learning by doing.

Section 4(b). This section provides a new subchapter IV, to be added to Chap. V of U.S.C. title 5. I especially endorse the simplicity and inclusiveness of the proposed "§582(a)," which authorizes use of any ADR means for resolving "any issue in controversy that relates to an administrative program if the parties agree to such procedures." Leaving the matter open-ended, as this does, is wise.

The following subsection (b) sets forth considerations that might properly lead to concluding that ADR is inappropriate in a particular instance; but I do not read the subsection as creating jurisdictional parameters that might encourage litigation unrelated to the merits of the dispute sought to be resolved.

Section 4 (b). This subsection also proposes a definition of a "neutral" who would be deemed suitable to serve in a dispute resolution proceeding. A "neutral," according to this segment of S.2274, is a person in or out of Government service "who has demonstrated competence and is professionally qualified in the area of dispute resolution." I appreciate the good intent of this definition, but I believe it to be disadvantageous.

I urge the Subcommittee to declare that a "neutral" may be any person who is acceptable to those involved in the dispute. The proposal that the neutral must be "professionally qualified" raises the fearful possibility that ADR may become spuriously professional as have many other occupations in our country, more for the ultimate purpose or result of excluding competition than excluding incompetents. So long as the parties must agree on the neutral (or, if they do not agree, are likely at any rate to draw from a quality-minded source), the statute should leave the door open without putting hurdles in the path. Abraham Lincoln, whose early feats as a mediator and arbitrator have been recounted by generations of biographers, would assuredly not be deemed to have been "professionally qualified" at the outset. If at times disputants do in fact share confidence in the probity, judgment, and neutrality of a person who has never until now been publicly linked with the resolution of disputes, why should they not turn to such a person?

Roster of Neutrals - Section 4(b). The bill proposes that the Administrative Conference of the United States "establish standards for neutrals" and "maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals." Creating a roster that may have suggestive value for agencies and other disputants as yet unable to settle on a mutually acceptable neutral may indeed be valuable. Fortunately, the bill does not confine an agency's choice to those whose names appear on that roster. Limitation of that kind would be a disservice. Anyone whom the parties deem to be acceptable should indeed be acceptable, whether or not that person's name is included in a listing.

This is especially important in the context of citizen-government controversy in so immense a country as ours. An officially compiled roster of persons officially believed to be suitable for neutral services is almost certain to be marked by a concentration of officially certified neutrals in and around the District of Columbia (and possibly also a few other main population centers). If an administrative agency involved in, say, an arbitration is to be constricted to that roster when choosing an arbitrator, cheap and speedy dispute resolution will suffer a setback. If a supplier of materials for some governmental agency in Iowa or in Alabama is having a contractual dispute with the United States, why should not the contracting officer and the contractor be able to agree that the president of the local chamber of commerce (who has never before been called on to resolve a dispute) has their confidence and that they might as well ask him to help them dispose of their disagreement? Or why should they not be able to ask the Better Business Bureau of Central Iowa or the Rotary Club of Birmingham to suggest to them a few names of people upon whom they might call for aid? If the local disputants must have recourse to a Washington-oriented roster, costs will go up and informality will go down. In sum, no matter how the ACUS roster may be compiled, it should be an aid and not a limitation. Otherwise, the roster might become a costly impediment to dispute resolution, rather than a means of achieving it.

Respectfully submitted,

Walter Gellhorn

Walter Gellhorn

Senator **Heflin**. Senator Grassley, you introduced the bill. Why don't you go ahead and question first?

Senator **Grassley**. OK. First of all, I have three unanimous consent requests. I would like to have a statement by Robert Coulson submitted for the record, if I could.

Senator **Heflin**. It is so ordered.

Senator **Grassley**. And I would like to have unanimous consent to place my statement in the record after yours.

Senator **Heflin**. So ordered.

Senator **Grassley**. And I would also like to have unanimous consent for a statement by Eldon H. Crowell to be put in the record, and also a statement by a nonprofit organization called The Conflict Clinic, Inc., under the leadership of Tom Stoner, who is an Iowan—I would like to have that included in the record as well.

Senator **Heflin**. Without objection, they will be included.

[Documents submitted by Senator Grassley follow:]

AMERICAN ARBITRATION ASSOCIATION
140 WEST 51 STREET, NEW YORK, N. Y. 10020 (212) 484-4000

Statement

of

Robert Coulson

President

American Arbitration Association

I have been requested by Senator Heflin to comment on the proposed Administrative Dispute Resolution Act of 1988. For the past quarter century, I have been working with the American Arbitration Association to expand the use and understanding of various voluntary procedures, such as arbitration, mediation, conciliation, negotiation and democratic elections. The Association, a 501 (c) (3), membership organization, has served the community since 1923.

As Sec. 2 (3) of the Bill notes that "alternative means of dispute resolution... have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious".

This is true. Most business disputes are negotiated to a conclusion in discussions between the parties. Some, more intractable, are resolved through negotiating processes that are somewhat more elaborate, often involving a neutral facilitator, mediator or fact finder, and sometimes disputes are submitted to arbitration. Last year, the American Arbitration Association handled over 53,000 disputes, mostly through binding arbitration, but also through mediation or private minitrials. Equally important, the Association has trained thousands of mediators and arbitrators and publishes educational material on alternative procedures. 58,000 arbitrators and mediators serve on the Association's various panels. All of this activity has made the American Arbitration Association a leader in the field of alternative dispute resolution (ADR).

This experience, working on a daily basis with these techniques and studying, researching and promoting their use, has convinced us that the Senate is on the right track in attempting to persuade Federal administrative agencies to adopt similar procedures.

Systems of dispute settlement which the parties select themselves "foster stability because of the acceptability of such means to the parties involved", as the Bill states in Sec. 2 (4). Parties are more willing to abide by the results if they are allowed to select their own system of dispute resolution.

This is not to say that Congress should abandon efforts to improve administrative procedures or to support court reform. The judicial process and administrative procedures are essential parts of American democracy. For issues involving constitutional interpretation or the defense of fundamental human rights, the jury trial and appellate review are the ultimate guarantee of our heritage.

Nevertheless, we know that many disputes can be efficiently and equitably resolved through alternative methods. The private sector has demonstrated the benefit of such an approach. Now, the Federal government can take advantage of that experience, applying alternative dispute resolution to appropriate areas of administrative activity.

I would suggest that a careful study be made of those areas where Federal agencies have become involved in unnecessary litigation and protracted administrative procedures. Then alternatives can be devised. For example, a survey might focus upon litigation involving the Federal government in the U.S. District Courts. Certain categories of cases are already obvious.

For example, the many petitions from federal prisoners have become a burden upon the judiciary, a significant portion of district court litigation. Mediation or the creation of a national prison ombudsman could sharply reduce that caseload by identifying the underlying causes of such complaints, taking steps to alleviate conditions in over-crowded Federal institutions. An obvious problem: a simple solution.

Another major category of litigation in the Federal courts are collection cases where the government seeks to recapture loans and overpayments. The student loan recovery problem is well known. It should not be difficult to design an arbitration system, to resolve the issues in such cases, to expedite the collection process. Here, a private, non-profit agency like the American Arbitration Association might play an appropriate role. Again, an obvious problem: a simple solution.

In the mid-nineteen eighties, the volume of claims for disability benefits under Social Security became a serious problem, flooding the Federal courts. This was caused by a politically motivated policy adopted by the administration, forcing many disabled people to file claims and initiate subsequent law suits. The cure required a change in policy. Those claims dwindled when the administration abandoned its stubborn position.

My point is this: alternate dispute resolution is a sound and positive goal. In order to inject more of it into Federal administrative agencies, those areas of controversy that are causing problems should be identified, exactly as is suggested in Sec. 2 (7). "Every agency should undertake a careful review of programs and the disputes involved..."

When problems are identified, the Administrative Conference and selected experts on alternative dispute resolution can design sound, sophisticated techniques to resolve those issues. The American Arbitration Association pledges its availability to help in that effort. Federal agencies have only to indicate their interest. Thanks to a three year grant from the Hewlett Foundation and continuing support from many law firms, corporations, unions and individuals, the AAA is already prepared to volunteer its help.

We applaud the idea that senior officials be identified, to take responsibility for dispute resolution in each agency. Such a person can select those personnel in each agency who should be trained. Training is essential. Through its National Affairs office in Washington, AAA Vice President Tom Colosi, an authority on these processes, already provides training in dispute resolution to dozens of Federal agencies. Such training includes both theory and practice. Administrative representatives need to know how to negotiate, how to make use of mediation, how to present their case to an arbitrator. Also, they need to know how to design dispute resolution mechanisms to handle the particular disputes that concern their agency.

Private parties that deal with such agencies may not know that alternative dispute resolution procedures are available. That is why the affirmative duty proposed in Sec. 556 (c) (7) of Title 5 of the U.S. Code should be established. Agencies should "inform parties as to the availability of one or more alternative means of dispute resolution and to encourage such methods".

Federal agencies should have the authority to use alternative means if the parties so agree. It may not even be necessary to define exactly what kinds of cases are appropriate for such methods. Cases involving legal precedents or significant questions of Government policy or the interests of third parties or the other characteristics described in Sec. 582 (b) are unlikely candidates. Because of their nature, the parties will not submit to ADR.

Sec. 583 is a wise provision. In order for mediators and arbitrators to be acceptable to parties, they must be impartial and knowledgeable. Mediators serve at the will of the parties. Arbitrators should be mutually selected or appointed by an impartial agency. A Federal agency engaged in a dispute may not be or seem impartial.

We applaud the provisions on confidentiality in Sec. 584. Mediators need that protection and must be able to probe the positions and perceptions of the advocates, accepting information in confidence. Waiver should occur only when both the mediator and the parties give up their rights.

Section 585 (a) (1) is essential if Federal agencies are to take advantage of our strong national policy in favor of contractual arbitration. "Arbitration.... may be used whenever all parties consent, either before or after a dispute has arisen" The Federal government should not be foreclosed from a system that is so widely used, both in the private sector and in international commerce? The Federal Arbitration Act serves as the foundation of modern commercial arbitration practice. Government should build upon that well tested ground, as Section 586 of the Bill provides.

This is not to say that arbitration should always be binding upon both parties. Some arbitration programs in the private sector are advisory or are binding upon a merchant but optional as to the customer. One of the benefits of ADR is its flexibility.

We would also support Section 587. The parties should be allowed to participate in the selection of their arbitrator. The procedures of the American Arbitration Association offering that right, offering a model for Federal agencies. Section 588 follows the general practice in private arbitration. Even Section 589 (5) follows contemporary domestic practice. Arbitrators generally "interpret and apply relevant statutory and regulatory requirements legal precedents and policy directives". Only recently, the United States Supreme Court confirmed that arbitrators are well quelified to decide many Federal statutory issues. McManus v. Shearson/American Express, (1988).

The 30 day time limit generally found in rules of American Arbitration Association has been included in the Bill in Section 589 (5) (e). Obviously, we applaud this provision. Arbitration should be reasonably expeditious.

Section 590 (a) provides for "a brief, informal discussion of the factual and legal basis" of the award. Opinions are not generally required in domestic arbitration under the Federal Arbitration Act, or by the courts. But since these cases may involve statutory interpretation, the requirement may be appropriate. At any rate, the award is enforceable under Section 9 of Title 9 of the United States Code, the Magna Carta of domestic arbitration.

Section 592 and 593 would authorize administrative agencies to use private arbitration services, such as the American Arbitration Association, or certain dispute settlement services of the Federal Government. The two agencies mentioned were established to help resolve specialized issues. The Federal Mediation and Conciliation Service was created to assist labor and management in collective bargaining. The Community Relations Service was created to help conciliate civil rights disputes. Your committee should know that the administrative matters contemplated in this bill may take those agencies into territory beyond their designated areas of expertise. Would it be wise to convert such specialized agencies into all-purpose dispute resolution services?

In the alternative, the Bill seems to contemplate the establishment of the Administrative Conference as a source of impartial assistance. That agency has exhibited interest in the field. It has shown leadership in encouraging a greater use of alternative dispute resolution by Federal agencies. If the Senate extends the authority of the Administrative Conference in this area, the American Arbitration Association will provide full support and cooperation. This is a political question as to which the Association should not express an opinion.

To conclude, I can pledge the cooperation of the American Arbitration Association, to help the Federal government make maximum use of alternative dispute resolution. These procedures have worked in the private sector. They have relieved the nations's courts of tens of thousands of cases. There is no reason why they should not work equally well for Federal agencies.

STATEMENT OF ELDON H. CROWELL

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Mr. Chairman, I would like to thank you for this opportunity to discuss with your Subcommittee the Administrative Dispute Resolution Act of 1988. Alternative Means of Dispute Resolution ("ADR") is a subject in which I have taken a keen personal interest, and in which our firm has played an active role in the context of government contract disputes. It is from the prospective of a private practitioner who specializes in government contracts law that I offer my comments today.

While representing the private industry in government contract disputes is a major component of our business, we share our clients' concern about the costs and delays inherent in the litigation process. In particular, private industry is concerned about the diversion of valuable management time and energy from productive activities, such as generating and performing new contracts, to the unproductive process of resolving disputes under contracts that may have been completed months or usually years before. It is for that reason that we support the proposed legislation, particularly the section encouraging use of ADR in government contract disputes.

I would like to begin my statement by reviewing the need for ADR in government contract disputes from a historical prospective. Second, I will address some of the inititives that have already been taken to alleviate the burden of litigation in these types of disputes. Third, I will present my comments regarding the proposed legislation.

The Need For ADR From A Historical Prospective

Government contracting is a multi-billion dollar industry. The federal government contracts for a wide variety of goods and services ranging from sophisticated weapons system, such as fighter aircraft and nuclear submarines, to mundane items like office supplies and janitorial services. These contracts spawn disputes over such issues as pricing, specification ambiguities, changes, changed conditions, and contract interpretation. In recent years, such disputes have proliferated and their magnitude has markedly increased.

The principal forums for reviewing and deciding claims under government contracts traditionally have been the agency boards of contract appeals. The boards were created to provide informal, expeditious procedures for resolving disputes without disrupting the contracting process or draining the resources of contractors and the government. But with the proliferation of disputes, the boards have fallen prey to many of the conditions that have burdened court litigation -- overcrowded dockets, shortage of personnel and resources, and lengthy delays in hearing and deciding cases.

In addition, changes in board procedures, prompted by demands of the government contracts bar as well as statutory mandates, have "judicialized" board proceedings by creating costly and time-consuming discovery and motions practice. The result is that the boards are often no more efficient and no less costly as disputes resolution forums than the court system.

In fact, ADR is nothing new in government contracts. It dates to the early 1900's when the first formal appeals procedures were instituted. In 1918, a Board of Contract Adjustment was established in the War Department to resolve contract disputes which could not be settled by mutual agreement. Before the Board was disbanded in 1922, it had resolved more than 3000 cases. At approximately the same time, the Secretary of the Navy created a Compensation Board to conduct hearings and interviews for purpose of dispute resolution. The Navy Board emphasized the use of Naval officers who were also leading technical and management experts. This Board operated until 1944 when it was replaced by the Navy Department Board of Contracts, which in turn was replaced, in 1949, by the Board of Contract Appeals.

With the onset of World War II, the number and magnitude of government contract disputes grew to such extraordinary proportions that other agencies began creating their own boards. Until the early 1960's, these forums were rather informal and expeditious. In most cases, there was very little discovery, and the proceedings were conducted in a fashion more akin to arbitration than court trials. If the contractor lost at the board level, it had the option to obtain a full-scale, de novo trial on the merits before the U.S. Court of Claims.

In the 1963 decision of United States v. Carlo Bianchi, 373 U.S. 709 (1963), the Supreme Court put an end to this practice when it held that findings of fact by the boards of contract appeals on disputes arising under the contract were final and binding, subject only to judicial review on the administrative record in the Court of Claims. The Court ruled that a de novo hearing on the merits would no longer be available in the Court of Claims and that the boards would be the only forums for hearing disputes under the remedy-granting clauses of the contract. Three years later, in United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), the Supreme Court decided that the Court of Claims would continue to exercise jurisdiction over breach of contract claims.

As a result of these Supreme Court decisions, the boards became the only forum where government contractors could obtain an evidentiary hearing on disputes "arising under the contract." Contractors and the bar exerted pressure to give the boards more of the trappings of courts, thus spawning rules changes allowing written and deposition discovery and providing for more structured, formalized hearings. As a result, board cases took longer to hear and became more expensive to resolve.

The culmination of this trend was the Contracts Dispute Act of 1978 ("CDA"). The CDA gave the boards of contract appeals all powers granted to the Court of Claims, including, for the first time, the power to subpoena witnesses to depositions or hearings. The Act made the jurisdiction of the Boards and the Court of Claims essentially co-extensive and gave contractors the option of appealing adverse agency decisions on contract disputes to either forum.

As a result the Boards became essentially indistinguishable from the Court of Claims: they had the same powers, took the same amount of time to render a decision, cost the same amount of money, and resulted in the same diversion of management resources from both the contractors and the Government. A similar trend toward "judicialization" has occurred in administrative adjudications and rulemakings before other federal agencies.

ADR Initiatives in Government Contract Disputes

The dissatisfaction with our current system of resolving government contract disputes has given rise to alternative methods of dispute resolution. On April 15, 1987 the U.S. Claims Court promulgated General Order No. 13, which established two methods of ADR: the settlement judge and the minitrial. In many instances, settlement can be promoted through frank discussions of each party's viewpoint before a neutral settlement judge who plays no role in the prior or subsequent litigation of the case. Although these discussions can take place at any time during the proceedings, it is preferable that they be held as early as possible to eliminate unnecessary cost and delay. Through the use of this ADR technique, the parties obtain an impartial appraisal by a neutral judge regarding the strengths and weakness of their case, thus enhancing the possibility of an early, equitable settlement.

In our practice, we have had several occasions to participate in minitrials. Two of those proceedings bear special mention because they illustrate two very different, but successful, applications of this ADR technique. The first was a minitrial of a government contract dispute between the National Aeronautics and Space Administration ("NASA") and TRW, Inc. The dispute involved claims for over $100 million under a contract for the production of the Tracking and Data Relay Satellite System. The claims involved state-of-the-art concepts of space science and hundreds of thousands of pages of documents. Had the dispute been processed through the NASA Boards of Contract Appeals or the Claims Court, discovery would have dragged on for more than a year, the hearing would have taken several months, and the ultimate decision may have taken two or more years to prepare. Instead, the dispute was resolved through a one-day minitrial and subsequent negotiations between the parties. In that case, presentations were given by the attorneys to senior executives of TRW and NASA, and the dispute was resolved without the use of a neutral advisor.[1/]

[1/] See Johnson, Masri, and Oliver "Minitrial Successfully Resolves NASA-TRW Dispute," Legal Times, Sept. 6, 1982, p. 13, c.1.

In 1985, a minitrial was used to resolve a $45 million claim by the contractor against the U.S. Army Corps of Engineers on the Corps' Tennessee-Tombigbee Waterway Project. The "Tenn-Tom" project involved the excavation and removal of 95 million cubic yards of earth over a three-year period. The contractor's claim was based upon the contention that its excavation activities had been impeded by differing site conditions -- i.e., soil conditions at the site that differed materially from the pre-bid geotechnical information provided to prospective contractors by the Government. An appeal was filed with the Corps of Engineers Board of Contract Appeals in late 1984, but proceedings were suspended by mutual consent to allow the minitrial to proceed.

The parties engaged in a two-and-one-half-day minitrial in which the evidence was presented through both lay and expert witnesses to senior executives of the Corps and the contractor, as well as a neutral advisor who was an expert in government contracts law. The dispute was resolved within a few days thereafter with a payment that represented a substantial compromise between the two parties' litigation positions. Again, it was estimated that the minitrial saved months of formal discovery, as well as a lengthy trial before the Board of Contract Appeals.[1]

The experience of these two minitrials illustrate a number of important points. First, the minitrial is a flexible mechanism that can be tailored to fit the facts of the dispute and the particular needs of the party. Thus, for example, the NASA-TRW dispute was resolved without the use of a neutral advisor, while the neutral played a significant role in the successful resolution of the Tenn-Tom dispute.

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[1] See Ruttinger, "Army Corps of Engineers Settles $45 Million Claim at Minitrial", Alternatives to the Higher Cost of Litigation, vol. 3, no. 8 (Aug. 1985) at 1.

Second, minitrials save not only litigation costs, but mitigate one of the great hidden costs of litigation -- diversion of management and technical personnel to the litigation process.

Third, the success of ADR is highly dependent upon the attitude of the parties -- they must take a non-adversarial approach that is geared toward amicable resolution, rather than the concept of winning or losing. Thus, an important component of the minitrial program at the Claims Court, as well as the successful minitrial program implemented over the past several years by the Corps of Engineers, is that the Government and the contractor appoint as principal participants senior executives who had no direct involvement in the underlying dispute and who have full authority to settle.

The Proposed Legislation

The proposed legislation implements many of the recommendations of the Administrative Conference set forth in its Recommendation 87-11, Alternatives for Resolving Government Contract Appeals. In particular, Section 5(a) of the Act would amend Section 6(a) of the CDA to require the Government's contracting officer to "make all reasonable efforts to resolve a claim or dispute consensually, before or after making a decision under this section." This provision recognizes the importance of exploring the use of ADR not only at the stage where a dispute has ripened into litigation, but also when a claim is still pending before the contracting officer. This affords the parties the opportunity to resolve a dispute quickly, before the litigation option is ever invoked.

The proposed legislation also eliminates one of the psychological impediments to the use of ADR by making it clear that the CDA was not intended to prevent the contractor and contracting officer from using ADR techniques to resolve contract disputes. This should eliminate the unfounded concern of some agency boards of contract appeals and the General Accounting Office that the use of ADR may be somehow inconsistent with the mandate of the CDA that all government contracts appeals be resolved through the formal processes of the boards or Claims Court.

Third, the proposed legislation would simplify the procedures for acquiring the services of private mediators and other neutral advisors by authorizing the Administrative Conference of the United States to establish standards for neutrals, maintain a roster of individuals who meet such standards, and enter into contracts for the services of neutrals, who can then be used by other agencies for ADR proceedings. The Act would also give the Federal Mediation and Conciliation Service explicit authority to allow its mediators to act as neutrals in disputes involving other federal agencies.

Conclusion

In conclusion, I support wholeheartedly the goals and provisions of the Administrative Dispute Resolution Act of 1988. If enacted, the Bill would go a long way toward removing some of the barriers to expeditious and efficient resolution of disputes between agencies and private industry generally, and government contract disputes in particular.

Thank you.

The Conflict Clinic, Inc.

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COMMENTS ON S-2274

ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1988

PREPARED FOR HEARINGS OF THE COURTS AND ADMINISTRATIVE PRACTICE SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE

May 25, 1988

The Conflict Clinic, Inc. thanks Senators Heflin and Grassley for their attention to the processes of government and thank this committee for the opportunity to submit written comments on S-2274 in this form.

The Conflict Clinic is a non-profit dispute resolution group affiliated with the Center for Conflict Analysis and Resolution at George Mason University in Fairfax, VA. The Clinic focuses on the study and resolution of complex public disputes. Frequently, an agency of the federal government is a party in these cases.

The Clinic wishes to go on record strongly supporting this legislation in its effort to encourage the use of more efficient methods of dispute resolution. We believe that a few areas could be strengthened, and it is to these areas that we turn out attention.

Affiliated with the
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1) Qualifications of third parties ("Section 583. Neutrals" and "Section 593. Qualifications"). Skills required to carry out this crucial role are not defined, except to exclude persons with direct conflicts of interest in the outcome. While experience in complex commercial, interpersonal or other private conflicts is an excellent foundation for these public matters, it is not, in our judgment, sufficient. We believe previous experience in handling complex public disputes is needed to give the third party the sensitivity to the public nature of the process and the issues surrounding the media, the problems of shared data, and need for linkages to other formal public processes. The Administrative Conference should be directed to integrate these qualifications and to proceed quickly with standard and roster-setting process to facilitate implementation of the Bill.

2) Evaluation of Administrative Dispute Resolution Procedures. While the Conflict Clinic believes that collaborative dispute resolution processes frequently produce marvelous results, better documentation is needed. Section 594 should be amended to provide that the Administrative Conference of the US in addition to compiling data on the use of alternative dispute resolution should evaluate the efficacy of these processes at regular intervals after the passage of this legislation.

3) Training for Agency Personnel Directing or Participating in Alternative Processes. Persons and groups trained in skills of adversarial debate can not be expected to adjust easily to collaborative processes. The Administrative Conference of the US should be given explicit authority (section 594) to create training programs for persons within and outside of the Federal Government to help prepare them for design of and participation in alternative dispute resolution proceedings.

The Conflict Clinic, Inc. would be happy to comment further at the request of this Committee. Again, we thank the Committee for the opportunity to submit comments.

-- Comments Prepared by
Frank Blechman, Associate
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Senator **Grassley**. First of all, Mr. Chairman, I want to thank you for holding this hearing and for the time you have given to it so far this morning.

I hear enthusiastic support for the idea from the panel, and I appreciate that very much, since they are experts in the area. And Mr. Edelman, I think maybe we can put you down as "very enthusiastic"—I was almost going to say "undecided" the way you ended up there. But thank you very much for that strong statement.

I would like to start with Chairman Breger. I would first of all thank you and your staff for all the assistance that the Conference has provided in working with me on this legislation. Admittedly, what S. 2274 does is to exhort the agencies to be more receptive to a process other than traditional litigation. This very fact, however, seems to cut against the need for actual legislation in that agencies can already do much of what is in S. 2274 on their own, that is, if they would be so inclined.

Given this, how would you convince my colleagues that a specific bill like S. 2274 is the only way to ensure that agencies will take the process seriously?

Mr. **Breger**. Well, first, I would have to restate what I believe to be the case—that there is an inertia and a resistance in the Government bureaucracy against making use of alternate dispute resolution techniques. To some extent, it is inertia; to some extent, it may be rational self-interest—why approve a settlement or encourage a settlement and worry about an inspector general or indeed a congressional committee looking over your shoulder and say that it wasn't a good settlement for the Government? Let the matter roll on for 3 or 4 years, and a judge will decide it, and even if it is 3 or 4 years of expense and considerably more money for the Government to pay out at the end; your hands are clean and you have nothing to worry about. So there is a self-interest element there as well.

I think there is also a lack of creativity with applicability of existing law. As I pointed out, before the Arbitration Act was passed, the courts were very loath to accept arbitration. After it was passed, and Congress gave its imprimatur, arbitration became understood and accepted, and indeed in many cases, a favored way of doing business.

Additionally, there are certain conditions that require legislative change. One is to amend the Federal Tort Claims Act to increase the amount by which agencies themselves can effectuate settlements from the present limit of $25,000 to $100,000. Presently, if there is a tort case over $25,000 against an agency, the agency lawyer can't sit down with private counsel and work out a settlement. They have to work out a tentative settlement, subject to approval by the Department of Justice.

Now, anyone who is a practicing attorney knows that you are not going to get as many settlements when you can't shake hands and have a deal; when the Government attorney has to have his fingers crossed when he shakes hands. That requires a change.

S. 2274 proposes changing the Contract Disputes Act to authorize voluntary arbitration. The bill also proposes to expand the authority of the FMCS to allow FMCS mediators to aid agencies in resolving disputes relating to any Federal program. And it would change the Administrative Procedure Act, in a sense the "Bible" of administrative procedure, to say specifically that ADR is acceptable and to allow the judge, when the parties have agreed to an ADR conference, to require the attendance of a party's representative who has the authority to negotiate.

Now, sometimes when you get two lawyers together you will end up with a bigger fight. But if you bring the actual parties to the disagreement into the same room, they will often be able to find a way, particularly when they listen to and hear the evidence, to negotiate an agreement more effectively and quickly than the attorneys; experience has shown that.

That is why we support the requirement that the actual parties or their authorized representatives be present at an ADR conference. I think what you want to do is point out to your colleagues that you have years of inertia to overcome. You should point out to them that this bill is necessary both in terms of making some specific changes in the law and in setting a climate that would allow for an agency to use many "arrows" in its dispute resolution "quiver," not just litigation and only litigation.

Senator GRASSLEY. I think the panel and myself appreciate that ADR does hold out promise for faster, less costly, less contentious, more satisfying resolution to dispute. But around town here, agency budgets are also a consideration. If ADR were to become more of a regular practice, what would be the implications upon the budgets of the agencies, and if that be positive, where could savings result, and how much maybe could be saved?

I would ask you and any of the other panel members who want to respond.

Mr. BREGER. Well, I have no exact figures, and I'd be happy to provide you with whatever research might exist on the subject. But it would be clear that there would be substantial savings in litigation costs and in litigation budgets.

Senator GRASSLEY. Mr. McMurray?

Mr. MCMURRAY. I don't have any exact figures either, Senator, but I can tell you I have hauled disputes off the courthouse steps and settled them and saved a lot of money over a period of time. I think the amount would be almost astronomical in some areas.

We, of course, are constrained by our budget. We continue to get increasing demands for ADR assistance. We are doing our best to provide it, but our budget was given to us to work in the labor-management field, so we are straining a little bit.

If you pass this legislation or a similar-type legislation, I think it will do two things. First, it will say to the bureaucracy, you don't need to do it the way you have always done it. You can do it a better way. And this, we think is a better way. And if you, for example, gave our agency a larger budget for ADR, I can assure you ADR would blossom all over the place. Currently we turn down more requests for our assistance than we can accept because of our budget constraints. But the amount you can save is anybody's guess, but it is pretty big.

Mr. EDELMAN. I wonder if I could comment?

Senator GRASSLEY. Yes.

Mr. EDELMAN. First, we did this as a resource saver. The savings in time of the resource, the people—ADR prevents the disruption of a program by taking away your most important people at the worst times, because of litigation that may have occurred 10 years ago. The retraining, the reeducation of those people to remember what happened is a huge cost to an agency that is trying to carry out its program.

One of the points that I put in my statement is the need for a method of evaluating what ADR does. And we in the Corps are working, we are at the very beginning steps of trying to make that kind of benefit-cost ratio. But I think it is needed, and I think it is the only way we can convince people. But I know for a fact that in my own agency, we have resolved cases—for example, I might point out, the Tennessee-Tombigbee litigation. The claim was $55 million, and it threatened to go on for the next 10 years, with the major construction corporations pushing that case. We resolved that in less than a week through an alternate dispute resolution procedure, a minitrial, for $17 million. We gave certainty to both the Federal agency and to the construction companies that were involved. We saved resource time here on the Hill, because there would have certainly been a fight on the appropriations to put up more money for that project—and it would have had to come, because that was an obligation.

So all I can tell you is that our experience, sir—and without being able to give you dollars and cents, because we are looking at that—is that it has been a tremendous resource saver.

Professor GELLHORN. I'd like to be anecdotal for just a moment in response to that question, Senator Grassley. Like my colleagues, I have no accounting insight. But during World War II, I was the Chairman of the National War Labor Board in Region II. The Board persistently ordered a system for arbitrating grievances be incorporated in collective bargaining agreements between management and labor. We wanted uninterrupted production during the war, and speedy determination of disputes was a desirable means to that end. We were not thinking at that point about cost, but merely about having a mechanism that would assure continued productivity.

However, in the post-war years, I think it fair to say—Mr. McMurray will correct me if I'm wrong—that about 95 percent of all labor-management contracts have voluntarily included compulsory arbitration as the terminal step of grievance procedure. I believe that today both management and labor would resist any effort to get rid of arbitration, because both of them have found that arbitration is such a tremendous cost-saver.

Isn't that true, Mr. McMurray?

Mr. McMURRAY. I agree. I agree with the Professor, yes.

Senator GRASSLEY. Thank you for that response.

I would like to go on to a criticism that we receive about ADR, because critics have a sense that it is going to translate into some sort of second-class justice. They express the position that we are not concerned with the substantive results reached from the standpoint of fairness and justice.

I'd like to have your sense of how S. 2274 responds to these concerns, if they do it adequately.

Mr. McMURRAY. How could it injure anybody's sense of justice? Certainly, an agreement between the parties is justice to them, better than imposed by a court, I would think. It doesn't offend my sense of justice.

Senator **Grassley**. Well, it is still a criticism that we get.

Mr. **McMurray**. I know, but you take business away from people, and they are going to criticize you.

Mr. **Edelman**. With respect to that again, I am not commenting on the bill, but I am commenting on our experience in the alternate dispute resolution procedure. We had in one of our cases—again, I keep harking back, and I ought to indicate we have had 7 or 8 minitrials; and we have had a number of other ADR procedures—but one of our big ones, again, was the Tennessee-Tombigbee. What happened in that particular case was there was a hotline complaint to the DOD IG's, complaining that the Government had given away money when they should have taken it through the court system, and that we were in effect resolving an issue just to resolve an issue.

I might point out that notwithstanding the DOD IG's notoriety, fame, for finding fault, that in this particular case they came back, and they indicated that ADR works; this was an appropriate case; the parties handled the risk of loss appropriately; it was in the Government's interest, that this could not have been accomplished through litigation in the courts, and it was certainly a first-class settlement agreement.

So I don't believe, and I don't think anybody who has been through this process will ever believe that this is anything but a fair, honest, sensible way of doing business. We don't need the courts as the only source to tell us when we are doing right and wrong.

Senator **Grassley**. I don't take lightly the concerns expressed by some about using ADR for Government cases. Their concern, it seems to me, is that the mere resolution of a Government dispute is not by itself proof that the public interest is served. I would like to use the following example.

Let's say that Congress sees fit to enact some tough environmental standards in the area of air pollution, and in the context of a subsequent enforcement action, the Government and the private parties agree to submit the dispute to a private arbitrator or mediator. In resolving the case, the arbitrator or mediator may apply weaker standards than that prescribed by Congress. Therefore, the matter is resolved, but the choices made by the legislature may be made irrelevant.

Is there any reaction to that type of a concern?

Professor **Gellhorn**. I have a reaction if I may offer it, Senator. If the matter were submitted to arbitration, the issue that the arbitrator was to decide would be spelled out by the parties. And if the issue were simply whether the respondent—that is to say, the outsider—had or had not done something, an issue of fact, that is the way the issue would be defined, not whether the standards were or were not good standards, or whether they should or should not be relaxed because they imposed hardship on this particular businessman.

So it seems to me that the protection against the possibility of undermining the congressional will and the generally applicable standards rests with the agency in its formulation of the issues that are to be determined by an outsider. If an agency were reckless in submitting to outsiders the question of what should be the standards, or whether the standards should or should not have escape clauses and things of that sort, I would suppose that the congressional oversight committee would pretty rapidly bring that agency to its senses.

Mr. **Edelman**. I throw myself back to something that occurred in the past, Senator. I spent 11 years as counsel for the House Public Works and Transportation Committee. During that time, I was very actively involved in the water pollution program. One of our biggest complaints both in the House and the Senate was the fact that parties joined together, including the executive agencies, with other parties and got consent agreements, which violated what Congress intended to happen in that legislation.

There is no guarantee that going to court will support that which Congress has done. As a matter of fact, that was a way, in my judgment, for getting around what the Congress had intended for almost a decade.

I would indicate, sir, that there is a better chance if all the parties of interest are involved, not merely two, but all the parties are involved in a regulatory or environmental type of matter, that their agreement will more clearly reflect that which the Congress wants than a consent agreement that is reached at the courts.

Mr. **Breger**. Mr. Chairman, no one is suggesting that every single case, or every single issue in every case, is appropriate for alternate dispute resolution. At present, though, there is no choice offered in most instances; you have to follow the formal administrative adjudication process, and that's it.

There are, I think, a number of different purposes of our system of law. One purpose is to provide a normative ordering for society, through the articulation of symbolic principles. Cases which primarily are about symbolic principles are less likely to be cases which would successfully make use of alternate dispute resolution, because they are cases in which the people want to have a fight, to end up with a finish; they want to end up with a symbolic decision one way or the other.

But the bulk of cases, 99.9 percent I would hazard to say, are about the resolution of individual disputes, individual problems. Those kinds of cases are more likely to be appropriate and be able to be better solved through use of alternate dispute resolution.

Now, no one is trying to put every possible case into a procrustean bed and say you must use arbitration, mediation, or conciliation. All we are saying, and all this bill would do is provide the enhanced opportunity to make use of ADR if the choice is a sensible and intelligent one.

Now, I must concede that there is a very small possibility that a case which is more appropriate for full-scale litigation could move into an arbitration track. But even here, I have to point out that you are only going to get a fair fight in litigation when both paladins on each side are equal. In many instances, the people or the commentators who are complaining about arbitration and ADR being "second-class justice" are failing to recognize that you don't have equal weight on both sides in most lawsuits in any event, and that it is often better to provide some justice for the average person than theoretically perfect justice, which he is not going to get, at least in this world.

Professor **Gellhorn**. May I interject another thought, Senator, if you will allow me to?

Senator **Grassley**. Yes.

Professor **Gellhorn**. I think we should stress in all of our discussions of this that we are not simply talking about the use of arbitrators as an alternative to use of judges for an adjudication and determination. What we want to do is to encourage administrators to pursue the possibility of eliminating controversy at earlier stages so it won't even be necessary to consider what sort of tribunal to use to resolve a continuing disagreement. And that in fact happens throughout the Government. We know in the criminal realm, where both the Constitution and statutes prescribe so much procedure, that very few cases in which a person has been arrested and charged with a crime ever go to trial. They are disposed of by consent along the way.

But somehow or other, in the administrative process which was intended to be the cathedral of informality, there is resistance to efforts to eliminate dispute before dispute has ripened into a contest that someone has to determine.

Anything that your committee can do to encourage a spirit on the part of administrative agencies, a receptivity to the possibility of eliminating controversy, would be a tremendous step forward.

Senator **Grassley**. What kinds of cases would you expect to be most likely well-served by arbitration—for instance, Government contracts, procurement cases.

Professor **Gellhorn**. Those are certainly among them, where the issue in controversy is simply whether the product that was provided by a contractor does or does not satisfy the specifications of the contract, or whether or not the job that was done was done at the quality level that was anticipated.

Another example, surely, would be tort claims, where the issue is did or did not someone carelessly run into my motor car—it seems ridiculous that that has to go through a full-scale litigation involving the Department of Justice and so on.

I think there are many fairly narrow factual controversies that do engage strong feelings on the part of claimants but can be disposed of either by negotiation, mediation, or by determination.

Senator **Grassley**. How about benefit program cases, such as Social Security disability cases?

Mr. **McMurray**. We already mediate some of those, in the age discrimination programs.

Senator **Grassley**. OK. How about black lung cases from the Department of Labor?

Mr. **McMurray**. I don't know why they couldn't be mediated.

Senator **Grassley**. How about veterans' benefits cases from the VA?

Mr. **McMurray**. It seems to me it would lend itself to it very comfortably.

Professor **Gellhorn**. If I may respond to that last one, I am not a veteran, and I don't know very much about the Veterans Administration, but I have the sense that in point of fact, most of those matters are disposed of informally through negotiation and settlement.

Senator **Grassley**. And I suppose I could go on and on, but do these types of cases that we have just talked about here in the last few minutes make up the bulk of agency disputes today?

Mr. **Breger**. They make up the vast bulk. And I will add that in many cases, the formal system is not working very well. Take Social Security disability. The Appeals Council cannot spend more than 15 minutes hearing an appeal because of the case load that they have. Now, that doesn't tell you that the formal, perfect justice, full due process system is working very well when it only has 15 minutes for an appeal.

So in many instances, the average person will get more substantial justice by taking advantage of these alternate dispute resolution quarrels.

Senator **Grassley**. Mr. Chairman, I have one last question and then I will submit the remainder for the record. You have been very patient, and I appreciate that very much.

Chairman Breger, your testimony touches on the constitutionality question. In *Buckley* v. *Valeo*, the Supreme Court held that some agency functions may not be delegated to private individuals where they involve, in the Court's words—and I quote—"performance of a significant governmental duty exercised pursuant to a public law."

Given this limitation, what are the implications for the use of private arbitration to determine the liability of the Federal Government as contemplated by S. 2274?

Mr. **Breger**. Well, without going into a constitutional dissertation, let me simply say the following. We believe in matters that refer to disputes of fact, or matters that refer to the application of fact to law, there is no constitutional bar to delegating those decisions to private parties, and we believe that the Supreme Court has both explicitly allowed this and also spoken of this inferentially, and there is no constitutional problem.

We would agree in theory that you could not delegate decisions about the constitutionality of statutes to an arbitrator or to a private party, but that is not what is contemplated here. We have a full study on this subject by Harold Bruff of the University of Texas Law School entitled "Public Decisions, Private Deciders: The Constitutionality of Arbitration in Federal Programs," which we would be happy to make available for the record.

Senator **Grassley**. Professor Gellhorn, would you comment on that, please, my same question?

Professor **Gellhorn**. I think that what the chairman has said is absolutely correct; I entirely support what he has said.

Senator **Grassley**. OK. Do either of you see any seventh amendment problems relating to the right of jury trial being foreclosed by this bill?

Professor **Gellhorn**. No, definitely not, because the bill doesn't require anything of any contestant with the Government; it says that if the contestant agrees to something, wishes to use some other process, he is not foreclosed from doing it, but he may dig his heels in and say, by God, I want a trial-type hearing, and I want review by the court of appeals, and I am going to fight this case to the Supreme Court if necessary. If he chooses that course, he is in no sense hampered from doing so.

Senator GRASSLEY. In that instance, does the seventh amendment require a trial de novo?

Professor GELLHORN. No, certainly not. This is a matter of consent to an alternative. One can waive a right to a jury trial, for example, even if one is being prosecuted in court. It is an opportunity rather than a requirement.

Senator GRASSLEY. What I mean is if it goes to trial, if the losing party requests a trial, would it require a trial de novo?

Professor GELLHORN. I can't see why. Having made an agreement to do something else, I should think that would be the end of the matter.

Senator GRASSLEY. Thank you very much. I have several other questions, but because of time, I had better submit them in writing. I appreciate an answer if I do that.

Thank you, Mr. Chairman.

Senator HEFLIN. What is the precedential value of the decision rendered by either arbitrator or a neutral? Does this decision become agency policy?

Mr. MCMURRAY. You are asking would it become agency policy?

Senator HEFLIN. Yes, I am just asking what is the precedential value. Will there be a body of precedents developed, and to what extent will the body of precedents control agency policy?

Professor GELLHORN. I serve fairly frequently as an arbitrator in matters involving governmental agencies in New York State and New York City. There are a few instances in which matters involving fairly broad policy issues have been submitted to an arbitrator, and I have had an arbitrator's decision cited to me by one or another contesting parties, the city department involved, and the union that is involved, for example. I don't think they have precedential value; they have persuasive value, but not precedential value in the sense that one is bound to follow the opinion of the first arbitrator who has considered the matter.

I think the real protection against too large an impact of an arbitration decision is in defining the issue that the arbitrator is to decide. And I would think that typically, in the case of Federal agencies, they would be at pains not to have matters of broad policy or statutory interpretation submitted for decision by an arbitrator.

Mr. BREGER. Mr. Chairman, it is my understand that this legislation specifically says that any award may not be used as precedent in any factually related proceeding; I think that is in section 590.

Mr. EDELMAN. I wonder if I could make one comment, sir. I feel compelled to make the point that in my judgment, the best ADR process is where the parties themselves make the decisions, and the third parties act as facilitators, mediators, conciliators and everything else that is necessary to make the parties of interest make their own decisions. And that is what we are striving for in our program.

Mr. MCMURRAY. I think we all agree on that.

Senator HEFLIN. Under the proposed bill, each agency would designate a senior official to be the dispute resolution specialist of the agency. It would then call for the training of various employees.

The agency can then use, as I understand it, one of those employees, or the parties can agree to a neutral from another agency. Of course, I suppose the purpose of that is to enhance the potential of agreement, because therefore they wouldn't appear to be controlled by the agency. I firmly believe in this independence of arbitrators. We have a bill that deals with bringing about independence in the administrative system by creating a central corps of administrative law judges, and to taking them out of the control—indirect or direct—of the agencies.

Now, the bill provides that the neutral be experienced in the area of dispute resolution, but there is no requirement that the neutral have expertise in the law of the particular agency. Should this be a concern of the parties who may choose this method of resolution?

Mr. McMURRAY. I don't think so. It is the mediator's function to work with the parties and help them solve it themselves. He or she doesn't need to have a basic knowledge of law.

Senator HEFLIN. He doesn't have to have the knowledge. What about the arbitrator?

Mr. McMURRAY. I think we all agree, don't we?

Mr. BREGER. There is a difference between mediation and arbitration. In arbitration——

Senator HEFLIN. Well, do you think you have to have a person who has had experience and expertise previously before you would qualify him as a neutral, as an arbitrator?

Mr. McMURRAY. I think you are getting into someplace where we might disagree just slightly. I think Professor Gellhorn and I, for example, happen to feel that all these qualifications are something that are a little hazy; we are not sure what qualifications are necessary, if any.

Senator HEFLIN. Well, a Federal district judge has all that.

Mr. McMURRAY. I, for example, ask why do you want to have an arbitrator with a lot of knowledge of the issue, because that person may be prejudiced. He is supposed to make a decision based on the record before him. So I'm more wide open myself—I think you are, too, Professor, aren't you?

Professor GELLHORN. Especially if the issues are of a factual nature, Senator; it seems to me not to make much difference if one understand the Clean Air Act, if the question is whether a particular appliance does or does not exude something, and that's the only issue.

Senator HEFLIN. I wish that rationale would be present in the thinking of certain other people pertaining to this other legislation.

Of course, what you are proposing here, if you had a body of neutrals who in effect did all of this, not to limit it to the Federal agencies, but to make them available to judges, the potential for alternate dispute resolution, particularly in those courts where there are backlogs, might well be a method of tremendous help.

In the overall field of two tiers of courts, the basic statistics that have come out are that only about 15 percent of those cases are ever appealed. Basically, the people in a dispute, if they have got a trier of fact or someone who goes through the basis of a trial, there is tremendous acceptance—they may disagree, but they accept.

And this, I think, has been the experience of mediation, conciliation, arbitration—all of the various aspects.

It appears to me that it may well be that we should give some sort of a broader view of this, and assure independence in the process, and to have some type of relief not only available to the Federal agencies, but available to the courts.

Do you have any comments on that?

Mr. **McMurray**. Some courts are now doing that.

Mr. **Edelman**. In the U.S. Claims Court, Senator, they recently put into their rules a provision permitting minitrials, the same kind we use. What they do is they use as the third person, the neutral person, not the sitting judge, but another judge in the court. They have tried that on a few occasions, and that has been successful. But they haven't gone beyond the court for the third person yet.

Senator **Heflin**. Well, just the concept that you don't have to have a court and such things, if they do it by agreement, the judge can suggest that this is available, and many people would agree to it. Actually, a magistrate is an alternate dispute resolver who, in most instances, does his work by the consent of the parties—not altogether, but in many instances that occurs. It is just a less expensive mechanism that could be presented to courts as well as Federal agencies. Well, that's just a thought.

Senator Thurmond, do you have some questions?

Senator **Thurmond**. Thank you, Mr. Chairman.

Mr. Chairman, I ask unanimous consent that my opening statement appear following the ranking member's statement in the record.

Senator **Heflin**. Without objection, so ordered.

Senator **Thurmond**. Mr. Breger, section 4 of this legislation would amend the Federal Tort Claims Act by increasing the ceiling on agency settlements to an amount in controversy of $100,000; is that correct?

Mr. **Breger**. Yes, sir.

Senator **Thurmond**. Would this provision give agencies too much authority to settle major tort claim actions?

Mr. **Breger**. Oh, I don't believe so, Senator Thurmond. That $25,000 figure was put in a law a good many years ago, in 1946, to be exact, and provided for no inflation factor. Anyone who reads the paper can see how tort judgments have risen dramatically over the past 20 years. At the moment, I would say the opposite is happening—agencies simply don't have enough authority to settle run-of-the-mill, ordinary, dollar cases which are the kind of cases that would be settled if two private parties, and not the Government, were involved. And the reason it is hard for them to settle is that you cannot sit down with a lawyer and make a deal when the Government attorney is of necessity saying, "This is the deal, assuming I can get approval from the Department of Justice."

The dynamics of negotiation just don't work that way. So we are costing the Government money, and we are restricting flexibility by this very, very low $25,000 threshold for tort settlements.

I certainly would agree with you that if it were very large judgments, you would want the Department to look into it to make a decision about its effect on the Government or governmentwide litigation strategy.

Senator **Thurmond**. Mr. Breger, this legislation has given rise to a number of constitutional concerns. These fears center on arbitration, since decisionmaking is shifted from Government to private hands.

Some of the constitutional concerns are that private arbitration may violate the requirements of due process—judicial power under article III of the Constitution is placed in private hands—and that Federal executive authority would be delegated outside the Government.

Would you please explain whether these concerns are valid in your opinion, and what measures can be taken to assure that ADR stays within the restraints of the Constitution?

Mr. **Breger**. I am aware that there have been concerns put forward in a round-about fashion by a number of people in the Department of Justice, although I have never seen a specific document actually addressing this constitutional issue in meaningful terms, Senator Thurmond.

I have to point out that in my view, this fear is simply far-fetched. As long as you are dealing with decisions about facts, and as long as you are delegating factual decisions in a controlled context, I don't believe that there is any article III problem, and I don't believe that there is any *Buckley* v. *Valeo* problem. Indeed, I would point out, sir, that a Medicaid scheme whereby private providers decide claims over Government reimbursement for health care—that is to say, the U.S. Government has delegated to private providers, private decisionmakers, the power to decide money claims—was explicitly approved in *Schweiker* v. *McClure,* 456 U.S. 188 (1982). And there are other cases in which the Court has recognized, including in arbitration under FIFRA and in employee labor grievance cases, that you can delegate public decisions to private parties.

If the Department of Justice has a problem in this regard—and I beg your pardon, sir, you may have an independent problem—I would be happy to address it at length. But it would be very helpful to see a written, specific document, laying forth the specific constitutional objections. You should be aware that the Administrative Conference explicitly addressed this matter in the Bruff study, mentioned above, and in the Conference's Recommendation 87-5, Assuring Fairness and Acceptability of Arbitration in Federal Programs.

Senator **Thurmond**. I had another commitment and could not be here for the full hearing, but have you expressed your opinion as to whether you favor the passage of this bill as it is, and if so, do you suggest any amendments?

Mr. **Breger**. We are supportive of this bill as it is. As with most legislation, it can be improved, but we have no specific proposals for improvement.

Senator **Thurmond**. You favor this bill?

Mr. **Breger**. Yes, sir.

Senator **Thurmond**. Mr. McMurray, as Director of the Federal Mediation and Conciliation Service, and in your experience as a labor negotiator, mediator and arbitrator, you have had the experience of seeing just how effective alternate dispute resolution can be. What do you see as the greatest benefit of alternate dispute resolution, and what, if anything, would you change in this legislation to improve upon it?

Mr. McMURRAY. Senator, I really haven't reviewed the bill with that thought in mind, because the administration has not taken a position on it. I was addressing my own experience with the effectiveness of alternate dispute resolution techniques. I don't really have any specific proposals for a change in the legislation—except I am a little skeptical, as I said earlier, about setting up a panel of experts to decide mediator qualifications because I am not sure what an expert is in this business. I think maybe the bill builds a little wall there we don't need. Except for eliminating those requirements, I don't think I would propose any major changes, Senator.

Senator THURMOND. You do not have any recommendation on the bill, then, as to whether you favor it or not at this time?

Mr. McMURRAY. I support the bill, Senator.

Senator THURMOND. You do support the bill.

Mr. McMURRAY. I would support the bill, yes, personally. I cannot speak for the administration.

Senator THURMOND. If you have any suggested changes after you study it, could you get in touch with the committee on that?

Mr. McMURRAY. I would be delighted to.

Senator THURMOND. Thank you.

Mr. Edelman, since the Army Corps of Engineers established the first ADR program within the Government, you have certainly had the benefit of experiencing firsthand the advantages and disadvantages of this alternative approach to litigation.

Would you please discuss briefly those areas of ADR which have proven to be more successful and those areas of ADR which have been unsuccessful?

Mr. EDELMAN. Well, sir, I can say we have used ADR in several areas. We have used ADR in the contract claims areas, the traditional contract disputes. We have used several different methodologies in that area. We have used minitrials, we have used nonbinding arbitration, we have used other procedures. We have also provided for the use of what we call a disputes panel. We have that clause in at least one of our contracts. We have not yet had a case using that methodology.

Every, single one that we have tried has worked; none have failed. Every, single attempt we have done—and I am talking in the range of maybe 12 to 15 attempts, dealing from a $150,000 claim to a $62 million claim. Every, single one has succeeded.

We succeeded 2 weeks ago in a contract claim involving the U.S. Corps of Engineers District in Omaha with the Bechtel Corp. That is our latest success in the contract area. Again, it worked.

In the environmental area, we have used ADR processes in coming up with general permits under section 404, our program with the Federal Water Pollution Control Act. That is where somebody wants to do some work in the wetlands. We have used that process. We have brought all of the parties together, numerous parties. We have had great success with that, sir.

In the State of Florida, at Sanibel, and in our Vicksburg district, in a recent one involving oil exploration in a three-State area—both attempts worked excellently, very successfully.

I announced earlier today, sir, that we tried our first minitrial in a Superfund case, where we were one of the parties; the U.S. Department of Defense, through the Navy Department, was one of the responsible parties for discharges of hazardous material back in the 1950's.

Last weekend, after 3 days of a minitrial, we succeeded in coming to an agreement with the Goodyear Tire and Rubber Co., a very, very successful procedure.

Again, we have not failed when we have tried it in the environmental area, we have not failed when we have tried it in the Superfund area. We have a tremendous success story, sir.

We very much support it. We have been able to do it within our existing authorities. We are training people now how to understand how you do this. We are training people to have the right thought processes, the right mindset, on coming to agreements. It goes to the culture of the organization, sir. But I can tell you that every methodology that we have tried up to this time within the last 4 years, every case we have done, has had a successful result.

I might say that we don't believe we will always be that successful. We know we are going to have some that are not going to come to agreement. But we do know that even when that happens, we will be better prepared to go to litigation on the specific issues rather than a whole bunch of myriad issues; we will certainly narrow down what the issues of dispute are.

So this is a very long-winded way, sir—and I apologize—of saying that the methodologies that we have tried have been successful in the Corps of Engineers.

Senator THURMOND. Mr. Edelman, I want to ask you, do you support this bill as it is now written?

Mr. EDELMAN. I support the concept, sir. And again, I am not speaking for the administration; they have not stated their position. I support the concept of ADR. I do not necessarily support everything in the bill.

Senator THURMOND. Would you mind submitting to the committee any suggestions you would have to improve it?

Mr. EDELMAN. I certainly would, Senator; I would be pleased to.

Senator THURMOND. Thank you.

Mr. EDELMAN. I might indicate one other thing, if I could have the opportunity. I would just express one point, that I would not underplay that at the professional level of the Government—the professional lawyer, the professional manager level of Government—there is a strong feeling, I have to admit, against binding arbitration.

Incidentally, we have used nonbinding arbitration successfully. But there is a strong mindset against binding arbitration in the Federal sector. And what we have said in the Corps of Engineers to the Administrative Conference is that if appropriate legislation were passed, I would be perfectly willing, speaking for the Corps of Engineers, to undertake a pilot program for 2 or 3 years in the contract claims area and any other area and report back to the Administrative Conference and to the Congress as to whether we think it worked.

Senator THURMOND. Thank you.

Professor Gellhorn, this legislation is an effort to bypass the formality of procedures surrounding controversies. What do you see as the short-term and long-term effects of this legislation on the administrative process?

Professor GELLHORN. I hope the immediate effect would be to eliminate a mindset on the part of some agencies of the Government who think that because Congress has said that a stated procedure should be utilized in the event of continuing controversy, that procedure must be used at the very outset rather than as a last resort. If that were done, in my estimation, considerable progress in the effectiveness of Government would be achieved, both as a short-term and as a long-term benefit.

My own sense of this legislation is that it is necessary not so much to overcome genuine obstacles to the use of common sense—and the bill itself speaks of encouraging the use of common sense—I think that there are no obstacles to reliance on common sense, but some administrators act as though there were, and the enactment of a measure based on this bill, I believe, would very markedly affect the approach of officials.

Senator THURMOND. Thank you very much. I have been called to the floor. I thank you, gentlemen, for your appearance here this morning.

Senator HEFLIN. Thank you, gentlemen. We appreciate your testimony.

[Whereupon, at 11:25 a.m., the subcommittee hearing on S. 2274 was concluded.]

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